SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 65

UNITED STATES, PETITIONER,

vs.

LOUIS T. MERZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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1. IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 6772

UNITED STATES OF AMERICA, *Appellant*,

v.

LOUIS T. MERZ, ET AL., *Appellees*.

Appellant's Statement of Points on Appeal—Filed July 15, 1961

The United States of America, appellant, respectfully makes the following statement of points upon which it intends to rely on appeal:

1. The commission did not satisfy its duty to make adequate findings of fact and conclusions of law.

2. The commission erred in admitting the witness Willcox's valuation testimony and testimony of offers.

3. The awards were grossly excessive and not supported by the evidence.

4. The district court erred in adopting the reports, since the reports were clearly erroneous.

UNITED STATES OF AMERICA,
Appellant

RAMSEY CLARK,
Assistant Attorney General

ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys, Department of Justice,
Washington 25, D. C.

2 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, *Plaintiff*,

v.

711.78 acres of land, more or less, situate in Washita County, Oklahoma, A. R. Babb, Administrator of the Estate of William A. Babb, deceased, et al., *Defendants*.

No. 7007, Civil.

Complaint—Filed March 8, 1956

1. This is an action of a civil nature brought by the United States of America at the request of the Under Secretary of the Air Force of the United States of America for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof; the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Acts of
3 Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171) which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610, 611; 10 U.S.C. 1343a, b and c), which act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947 (61 Stat. 495); and the Act of Congress approved July 27, 1954 (Public Law 534—83rd Congress), which act authorized the acquisition of land.

3. The public uses for which said land is taken are as follows: The land is necessary adequately to provide for the establishment of additional facilities for the use of the Department of the Air Force and for other military uses incident thereto. The said land has been selected under the direction of the Secretary of the Air Force for acquisi-

tion by the United States for use in connection with Clinton-Sherman Air Force Base, Washita County, Oklahoma, and for such other uses as may be authorized by Congress or by Executive Order.

4. The interest in the property to be acquired is:

(1) The continuing perpetual right to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs or any other perennial growth or undergrowth infringing upon, extending into, extending above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as described in Schedule "Z" attached hereto.

(2) The continuing perpetual right to remove, to raze, to destroy, and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above the Glide Angle Plane and/or Transitional Surface as described in Schedule "Z".

(3) The right of ingress to, egress from, and passage on the lands described in Exhibit "A" for the purpose of exercising the rights hereby taken for said public uses. Reserving, however, to the land owners, their heirs, executors, administrators, successors, and assigns, all rights, titles, interests, and privileges as may be exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses.

Subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is described in the Exhibit A hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

Tract No. A-102E

A. R. Babb, Administrator of the Estate of William A. Babb, deceased,	Sentinel, Oklahoma
Heirs of the Estate of William A. Babb, deceased,	
Bertha E. Babb	Dill City, Oklahoma
A. R. Babb and Kate Babb, his wife,	Sentinel, Oklahoma
Elzie Babb King, and Clarence King, her husband,	Sentinel, Oklahoma
Thelma Babb Teague, and Virgil Teague, her husband,	Box 191, Littlefield, Texas
Henry Walters, Tenant,	Route 1, Canute, Okla.
Phillips Petroleum Company,	Bartlesville, Okla.

5 Tract No. A-103E

Iver B. Thompson, and Dirthie Thompson, his wife,	Route 1, Canute, Oklahoma.
Audrey V. Williams	Address Unknown
Opal May Elliott	Address Unknown
Richard Williams, Tenant,	Route 1, Canute, Oklahoma

Tract No. A-104E

Louis T. Merz,	Foss, Oklahoma
Leo J. Merz,	Foss, Oklahoma
Minard Henderson, and Grace Henderson, his wife,	Groom, Texas.
R. B. Hoover,	Foss, Oklahoma
Prudential Insurance Company of America,	Oklahoma City, Oklahoma

Tract No. A-106E

W. E. Guthrie and Bernice Guthrie, his wife,	Foss, Oklahoma
Federal Land Bank of Wichita,	Wichita, Kansas
Peppers Refining Company	2915 Lincoln, Oklahoma City, Okla.
Rita Oil Company	Address Unknown
Nick Schones and Anna Mary Schones, his wife,	Address Unknown

Tract No. A-107E

John Kerkhoff and Katherine H. Kerkhoff, his wife,	Foss, Oklahoma
Heirs of Estate of Bernard Kerkhoff, deceased,	Address Unknown
Raymond Kerkhoff, otherwise known as Raymond Kirkhoff,	Address Unknown
John Kerkhoff, otherwise known as John Kirkhoff	Address Unknown
Helen Pohlman,	Address Unknown
Margaret Pohlman	Address Unknown
Heirs of Estate of Henry G. Kerkhoff	Address Unknown
William H. Kerkhoff	Address Unknown
Lizzie Kupka	Address Unknown
Edward Kupka	Address Unknown
Leo Kupka	Address Unknown

Peppers Refining Company	2915 Lincoln, Oklahoma City, Okla.
W. A. Dunigan	Address Unknown
C. H. Burton	Address Unknown
S. J. Jewell	Address Unknown
Reedy Boles, Koch Oil & Gas Company, an Expressed Trust Reedy-Boles-Koch Oil & Gas Company, as *Exprssed* Trust, F. A. Boyle, President, A. G. Koch, Secretary-Treasurer	Address Unknown

Tract No , A-116E

E. O. Wood and Minnie A. Wood, his wife,	Sentinel, Oklahoma
Willis Stroud, Tenant	Foss, Oklahoma
Magnolia Petroleum Company	Oklahoma City, Oklahoma

Tract No. A-117E

Charles J. Higgenbotham, and Jennie P. Higgenbotham, his wife,	Sentinel, Oklahoma
7 Federal Land Bank of Wichita	Wichita, Kansas.
Phillips Petroleum Company,	Bartlesville, Oklahoma
Walter Schneider, and Elizabeth Schneider, his wife,	Address Unknown
J. L. Galloway	Address Unknown
Eddie Greteman, Tenant,	Foss, Oklahoma.

Tract No. A-118E

Robert E. Davis,	Burns Flat, Oklahoma
Ed. Taylor, Tenant,	Burns Flat, Oklahoma
Magnolia Petroleum Company,	Oklahoma City, Oklahoma

Tract No. A-119E

E. E. Smith, and Pearl T. Smith, his wife,	Dill City, Oklahoma.
Willis Stroud, Tenant	Foss, Oklahoma

Trace No. A-122E

Bertha Kinney Rogers, and F. C. Rogers, her husand,	Cordell, Oklahoma.
Juanita Kenney Nagel, and Howard Nagel, her husband,	113*ON*. Oswego, Tulsa, Oklahoma
Wanda Kinney Riggins, and J. B. Riggins, her husband,	400 W. Grand, Oklahoma City, Oklahoma.
W. S. Wallace, Tenant	Dill City, Oklahoma.
Phillips Petroleum Company	Bartlesville, Oklahoma.
Charles S. Ford,	Address Unknown.

Tract No. A-123E

Glenn O. McDonald	Carter, Oklahoma
Charlie O. Rivers and Myrtle Rivers, his wife,	Address Unknown
The Prudential Insurance Company of America,	Oklahoma City, Oklahoma.
Wayne Armstrong,	Burns Flat, Oklahoma.
Earl Leverton,	Burns Flat, Oklahoma..
Nettie Edith Bryan	Burns Flat, Oklahoma.

Estate of W. C. Armstrong, deceased	
Mrs. T. H. Armstrong	Address Unknown
L. T. Armstrong	Siloam Springs, Arkansas
Estate of F. G. Kilewar, deceased Frank Kilewar	Cordell, Oklahoma
John B. Hinds,	Address Unknown
Phillips Petroleum Company	Bartlesville, Oklahoma
Atlantic Pacific Oil Company	Address Unknown

Tract No. A-124E

Heirs of Estate of Charles M. Hoover, deceased	
Ella B. Hoover,	Foss, Oklahoma
R. B. Hoover,	Foss, Oklahoma
Federal Land Bank of Wichita	Wichita, Kansas
Edward Gunter, Tenant	Dill City, Oklahoma.

7. The Board of County Commissioners of Washita County, Oklahoma, the County Treasurer of Washita County, Oklahoma, and the State of Oklahoma may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named there are or may be others whose names are unknown to plaintiff and such persons are made parties to the action under the designation "Unknown Owners".

9 9. Agreements determining the amount of just compensation payable by plaintiff with respect to Tract No. A-123E have been entered into with Glenn O. McDonald on July 6, 1955 and with Phillips Petroleum Company on August 11, 1955.

Wherefore plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded, and for such other relief as may be lawful and proper.

PAUL W. CRESS
United States Attorney
Western District of Oklahoma

H. DALE COOK
Assistant United States Attorney
Western District of Oklahoma

Trial by jury of the issue of just compensation is demanded by plaintiff.

Clerk's Note re Exhibit "A"

The land which is the subject matter of this proceeding in condemnation, referred to in Paragraph 5 of the Complaint, situate and being in Washita County, Oklahoma, is described as follows:

The descriptions are set out in schedule A to the declaration of taking No. 1 which appears at page 13.

Schedule "Z" to Complaint

The Glide Angle Plane and Transitional Planes of Clinton-Sherman Air Force Base, Washita County, Oklahoma, are respectively defined as follows:

10 RUNWAY APPROACH ZONE

The runway approach zone is described as follows: Beginning at a point in the line of prolongation of the center line of the N-S Runway of the Clinton-Sherman Air Force Base, level with and 1000 feet distant from the end of said runway; thence to the right forming an interior angle of 90° 00′ 00″ with the line of prolongation of the center line of the runway, 750 feet to a point; thence to the left forming an interior angle of 97° 07′ 30″ with the last mentioned line, 10,077.82 feet to a point; thence to the left forming an interior angle 82° 52′ 30″ with the last mentioned line, 4000 feet to a point; thence to the left

forming an interior angle of 82° 52′ 30″ with the last mentioned line, 10,077.82 feet to a point 750 feet from the point of beginning; thence to the left forming an interior angle of 97° 07′ 30″ with said last mentioned line, 750 feet to the point of beginning.

Glide Angle Plane

The glide angle plane is a trapezoidal plane extending over the runway approach zone starting at an elevation equivalent to the center line elevation at the end of the runway and sloping upward from the narrower end at a rate of 1 foot vertically for each 50 feet horizontally.

TRANSITIONAL ZONES

The transitional zones lie on each side of the runway and on each side of and adjacent to the approach zones, as follows: (a) The zones lying along the runway, extend the entire length of the runway plus an additional 1,000 feet at each end. The inside lines lie parallel to, level with, and 750 feet distant, measured perpendicularly, from the center line of the runway. The outside lines are situated outward, measured perpendicularly, a horizontal distance of 1,500 feet from the center line of the runway. (b) The zones lying on each side of and adjacent to the runway approach zone above defined, begin at points 750 feet distant, measured perpendicular to the prolongation of the center line at a point 1,000 feet away from the end of the runway involved, thence continuing perpendicular to the prolongation of the center line 750 feet; thence away from the end of the runway forming an interior angle of 89° 08′ 30″ with the last mentioned line, 5,357.60 feet to a point on the outer boundary of the runway approach zone; thence towards the end of the runway, forming an interior angle of 7° 59′ 00″ with the last mentioned line, 5,398.70 feet along the outer boundary of the approach zone to the beginning.

Transitional Planes

The transitional planes extend upward and outward (a) from the inside of the transitional zones along the runway and prolongations thereof above defined, and (b) from the

outside boundaries of the glide angle planes sloping upward at a rate of 1 foot vertically for each 7 feet horizontally, measured at right angles to the center line of the runway involved.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Declaration of Taking No. 1—Filed March 8, 1956

To the Honorable The United States District Court:

I, the undersigned, James H. Douglas, Under Secretary of the Air Force of the United States of America, do hereby make the following declaration by direction of the Secretary of the Air Force:

I. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257), the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610; 10 U.S.C. 1343a, b, and c), which act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947 approved July 26, 1947 (61 Stat. 495); and the Act of Congress approved July 27, 1954 (Public Law 534—83rd Congress), which act authorized the acquisition of land. Funds for this acquisition are available from prior years' appropriations pursuant to Section 902 of Public Law 663—83rd Congress, approved August 26, 1954.

(b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the establishment of additional facilities for the use of the Department of the Air Force and for other military uses incident thereto. The said land has been selected under the direction of the Secretary of the Air Force for

acquisition by the United States for use in connection with Clinton-Sherman Air Force Base, Washita County, Oklahoma, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the Complaint in the above-entitled cause.

3. The estate hereby taken for said public uses consists of the following right in and over the lands described in Schedule "*A*:"

(1) The continuing perpetual right, to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon, extending into, extending above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as described in Schedule "*Z*."

13 (2) The continuing perpetual right to remove, to raze, to destroy, and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above the Glide Angle Plane and/or Transitional Surface as described in Schedule "Z."

(3) The right of ingress to, egress from, and passage on the lands described in Schedule "A" for the purpose of exercising the rights hereby taken for said public uses. Reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns, all rights, titles, interests, and privileges as may be exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses.

Subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

4. A plan showing the land taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said land, with all buildings and improve-

ments thereon and all *appertenances* thereto and including any and all interests hereby taken in said land is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

In Witness Whereof, the undesigned, the Under Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 14th
14 day of February, A. D. 1956, in the City of Washington, District of Columbia.

JAMES H. DOUGLAS
Under Secretary of the Air Force

Schedule "A" to Declaration of Taking No. 1

The land which is the subject matter of this Declaration of Taking aggregates 711.78 acres, more or less, situate and being in Washita County, Oklahoma, and is the same land described in the Complaint filed in the condemnation proceeding. Descriptions of the lands taken, the names of the purported owners thereof, and statements of the sums estimated to be just compensation therefor, are as follows:

Tract No. A-102E

Indian Meridian T. 10 N., R. 19 W., Section 22, The East 280 feet of the West 530 feet of the NW ¼. The area described aggregates 16.97 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
Heirs of Estate of William A. Babb, Deceased	c/o A. R. Babb, Administrator of Estate of William A. Babb, Deceased, Sentinel, Oklahoma
Bertha E. Babb	Dill City, Oklahoma

A. R. Babb, and Kate Babb, his wife	Sentinel, Oklahoma
Elzie Babb King, and Clarence King, her husband	Sentinel, Oklahoma
Thelma Babb Teague, and Virgil Teague, her husband	Box 191, Littlefield, Texas
15 Henry Walters, Tenant	Route 1, Cannte, Oklahoma
Phillips Petroleum Company	Bartlesville, Oklahoma

Estimated Compensation: $300.00.

Tract No. A-103E

Indian Meridian T. 10 N., R. 19 W., Section 22, The East 280.0 feet of the West 530.0 feet of the N ½ SW ¼. The area described aggregates 8.48 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
Iver B. Thompson, and Dirthie Thompson, his wife	Route 1, Canute, Oklahoma
Audrey V. Williams	Unknown
Opal May Elliott	Unknown
Richard Williams, Tenant	Route 1, Canute, Oklahoma

Estimated Compensation: $150.00.

Tract No. A-104E

Indian Meridian T. 10 N., R. 19 W., Section 3, A tract of land in the SW ¼ more particularly described as: Beginning at a point on the South line of said SW ¼, said point being 250.0 feet East of the SW corner of said SW ¼; thence North and parallel with the West line of said SW ¼ 1940.0 feet to a point; thence Northwesterly on a straight line to a point on the North line of said SW ¼, said point

being 162.5 feet East of the NW corner of said SW ¼; thence East along said North line 2375.0 feet to a point, said point being 102.5 feet West of the NE corner of said SW ¼; thence Southwesterly on a straight line to a point 700.0 feet South and 190.0 feet West of the NE corner of said SW ¼; thence South and parallel to the East line of said SW ¼ 1940.0 feet to the South line of said SW ¼; thence West along said South line 2200.0 feet to the point of beginning. The area described aggregates 134.70
16 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
Louis T. Merz	Foss, Oklahoma
Leo J. Merz	Foss, Oklahoma
Minard Henderson, and Grace Henderson, his wife	Groom, Texas
R. B. Hoover	Unknown
Prudential Insurance Company of America	Oklahoma City, Oklahoma
Estimated Compensation:	$7,165.00.

Tract No. A-106E

Indian Meridian T. 10 N., R. 19 W., Section 3, A tract of land in Lot 2, Lot 3, and the SE ¼ NW ¼ and the SW ¼ NE ¼ more particularly described as: Beginning at the North west corner of said Lot 3; thence East along the North line of said Lot 3 and said Lot 2 a distance of 1547.5 feet to a point, said point being 227.5 feet East of the North quarter corner of said Section 3; thence Southwesterly on a straight line 2660.55 feet, more or less, to a point on the East-West quarter line of said Section 3, said point being 102.5 feet West of the cneter of said Section 3; thence West along said East-West quarter line 1217.5 feet to the Southwest corner of said SE ¼ NW ¼; thence North along the West line of said SE ¼ NW ¼ and the West line of said Lot 3 a distance of 2640 feet, more or less, to the point of beginning. The area described aggregates 83.70 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
W. E. Guthrie, and Bernice Guthrie, his wife	Foss, Oklahoma
Federal Land Bank	Wichita, Kansas
17 Peppers Refining Company	2915 Lincoln, Oklahoma City, Okla.
Rita Oil Company	Unknown
Nick Shones, and Anna Mary Shones, his wife	Unknown

Estimated Compensation: $1,900.00.

Tract No. A-107E

Indian Meridian T. 10 N., R. 19 W., Sections 3 and 4, A tract of land being part of Lot 4 and part of the SW ¼ NW ¼ of Section 3, and part of Lot 1 and part of the SE ¼ NE ¼ of Section 4 and more particularly described as: Beginning at the NE corner of said Lot 4, Section 3; thence South along the East line of said Lot 4 and the East line of said SW ¼ NW ¼ 2640.0 feet, more or less, to the SE corner of said SW ¼ NW ¼; thence West along the South line of said SW ¼ NW ¼ 1157.5 feet to a point; thence Northwesterly on a straight line 2660.55 feet, more or less, to a point on the North line of said Lot 1, Section 4, said point being 167.5 feet West of the NE corner of said Section 4; thence East along said North line and the North line of said Section 3, a distance of 1487.5 feet to the point of beginning. The area described aggregates 80.10 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
John Kerkhoff, and Katherine H. Kerkhoff, his wife.	Foss, Oklahoma

	Heirs of Estate of Bernard Kerkhoff, deceased	
	Raymond Kirkhoff, John Kirkhoff, Helen Pohlman, and Margaret Pohlman, Heirs of Estate of Henry G. Kerkhoff, deceased	Unknown
18	William H. Kerkhoff	Unknown
	Lizzie Kupka, Edward Kupka, Leo Kupka	Unknown
	Peppers Refining Company	2915 Lincoln, Oklahoma City, Oklahoma
	W. A. Dunigan	Unknown
	C. H. Burton, and S. J. Jewell	Unknown
	Reedy Boles, Koch Oil & Gas Company, an Expressed Trust Reedy-Boles-Koch Oil & Gas Company, an Expressed Trust, F. A. Boyle, President; A. G. Koch, Secretary-Treasurer	Unknown

Estimated Compensation: $1,850.00.

Tract No. A-116E

Indian Meridian T. 10 N., R. 19 W., Section 22, The S ½ SW ¼ less a strip of land 190.0 feet in width off the East side thereof and also less a strip of land 250.0 feet in width off the West side thereof. The area described aggregates 66.67 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
E. O. Wood, and Minnie A. Wood, his wife	Sentinel, Oklahoma
Willis Stroud, Tenant	Foss, Oklahoma
Magnolia Petroleum Company	Oklahoma City, Oklahoma

Estimated Compensation: $2,250.00.

Tract No. 117E

Indian Meridian T. 10 N., R. 19 W., Section 27, A tract of land in the E ½ NW ¼ more particularly described as: Beginning at a point on the North line of said E ½ NW ¼, said point being 190.0 feet West of the Northeast 19 corner thereof; thence South and parallel to the East line of said E ½ NW ¼ 920.0 feet to a point; thence Southeasterly on a straight line 1531.83 feet, more or less, to a point on said East line, said point being 200.0 feet North of the Southeast corner of said E ½ NW ¼; thence South along said East line 200.0 feet to the Southeast corner of said E ½ NW ¼; thence West along the South line of said E ½ NW ¼ 1320.0 feet to the Southwest corner thereof; thence North along the West line of said E ½ NW ¼ 2640.0 feet to the Northwest corner thereof; thence East along the North line of said E ½ NW ¼ 1130.0 feet to the point of beginning. The area described agggregates 72.67 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
Charles J. Higgenbotham, and Jennie P. Higgenbotham, his wife.	Sentinel, Oklahoma
Federal Land Bank of Wichita	Wichita, Kansas
Phillips Petroleum Company	Bartlesville, Oklahoma
Walter Schneider, and Elizabeth Schneider, his wife	Unknown
J. L. Galloway	Unknown
Eddie Greteman, Tenant	Foss, Oklahoma

Estimated Compensation: $2,000.00.

Tract No. A-118E

Indian Meridian T. 10 N., R. 19 W., Section 27, A tract of land in the NW ¼ NW ¼ and the N ½ SW ¼ NW ¼ more particularly described as: Beginning at the NE corner of the NW ¼ NW ¼; thence South along the East line of said NW ¼ NW ¼ and the N ½ SW ¼ NW ¼ 1980.0 feet to the SE corner of said N ½ SW ¼ NW ¼; thence West along the South line of said N ½ SW ¼ NW ¼ 1202.5 feet to a point; thence Northeasterly on a straight line 1068.25 feet to a point, said point being 400.0 feet North and 250.0 feet East of the SW corner of the NW ¼ NW ¼; thence North 920.0 feet to a point on the North line of said NW ¼ NW ¼, and the N ½ SW ¼ NW ¼, said point being 250.0 feet East of NW corner thereof; thence East along said North line 1070.0 feet to the point of beginning. The area described aggregates 50.25 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
Robert E. Davis	Burns Flat, Oklahoma
Ed Taylor, Tenant	Burns Flat, Oklahoma
Magnolia Petroleum Company	Oklahoma City, Oklahoma

Estimated Compensation: $1,400.00.

Tract No. A-119E

Indian Meridian T. 10 N., R. 19 W., Section 27, NE ¼ SW ¼, SW ¼ SW ¼, and all that part of the NW ¼ SW ¼ and the S ½ SW ¼ NW ¼ more particularly described as: Beginning at the Northeast corner of said S ½ SW ¼ NW ¼; thence South along the East line of said S ½ SW ¼ NW ¼ and the East line of said NW ¼ SW ¼ 1980 feet to the Southeast corner of said NW ¼ SW ¼; thence West along the South line of said NW ¼ SW ¼ 1320 feet to the Southwest corner thereof; thence North along the west line of said NW ¼ SW ¼ 1040 feet to a point, said point being 280 feet South of the Northwest corner thereof; thence Northeasterly on a straight line 947.32 feet to a point on the North line of said S ½ SW ¼ NW ¼, said point being 117.5 feet East of the Northwest corner thereof; thence East along said North line 1202.5 feet to the point of beginning. The areas described aggregates 138.73 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
E. E. Smith, and Pearl T. Smith, his wife	Dill City, Oklahoma
Willis Stroud, Tenant	Foss, Oklahoma

Estimated Compensation: $3,700.00.

21 Tract No. A-122E

Indian Meridian T. 10 N., R. 19 W., Section 27, A tract of land in the W ½ W ½ SE ¼ more particularly described as: Beginning at the South quarter corner of said

Section 27; thence North along the North-South quarter line of said Section 27 2640 feet to the center of said Section 27; thence East along the East-West quarter line 25 feet to a point; thence Southeasterly on a straight line 2660.55 feet to a point on the South line of said Section 27, said point being 355 feet East of the South quarter corner thereof; thence West along said South line 355 feet to the point of beginning. The area described aggregates 11.52 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
Bertha Kinney Rogers, and F. C. Rogers, her husband	Cordell, Oklahoma
Juanita Kinney Nagel, and Howard Nagel, her husband	1130 N. Oswego, Tulsa, Oklahoma
Wanda Kinney Riggins, and J. B. Riggins, her husband	400 W. Grand, Oklahoma City, Okla.
W. S. Wallace, Tenant	Dill City, Oklahoma
Phillips Petroleum Company	Bartlesville, Oklahoma
Carl S. Ford	Unknown

Estimated Compensation: $125.00.

Tract No. A-123E

Indian Meridian T. 10 N., R. 19 W., Section 28, A tract of land in the E ½ E ½ SE ¼ more particularly described as: Beginning at the Southeast corner of said Section 28; thence West 295 feet along the South line of said Section 28 to a point; thence Northeasterly on a straight line 2378.37 feet to a point on the East line of said Section 28, said point being 280 feet South of the East quarter corner thereof; thence South along said East line 2360 feet to the point of beginning. The area described aggregates 7.99 acres, more or less, situate in Washita County, Oklahoma.

22 Names of Purported Owners:	Addresses of Purported Owners:
Glenn O. McDonald	Carter, Oklahoma
Charlie O. Rivers, and Myrtle Rivers, his wife	Unknown
The Prudential Insurance Company of America	Oklahoma City, Oklahoma
Wayne Armstrong	Burns Flat, Oklahoma
Earl Leverton	Burns Flat, Oklahoma
Nettie Edith Bryan	Burns Flat, Oklahoma
Estate of W. C. Armstrong, deceased Mrs. T. H. Armstrong	
L. T. Armstrong	Siloam Springs, Arkansas
Estate of F. G. Kilewer, deceased Frank Kilewer, Jr.	Cordell, Oklahoma
Phillips Petroleum Company	Bartlesville, Oklahoma
Atlantic Pacific Oil Company	Unknown

Estimated Compensation: $75.00.

Tract No. A-124E

Indian Meridian T. 10 N., R. 19 W., Section 27, SE ¼ SW ¼. The area described aggregates 40.00 acres, more or less, situate in Washita County, Oklahoma.

Names of Purported Owners:	Addresses of Purported Owners:
Heirs of Estate of Charles M. Hoover	
Ella B. Hoover	Foss, Oklahoma
R. B. Hoover	Foss, Oklahoma

Federal Land Bank of Wichita	Wichita, Kansas
Edward Gunter, Tenant	Dill City, Oklahoma
Estimated Compensation:	$1,000.00.

23 The gross sum estimated to be just compensation for the land hereby taken is $21,915.00.

Clerk's Notes re Schedule Z and Schedule B

Schedule Z is identical with the schedule, attached to the Complaint, which appears at page 9.

Three copies of schedule B, plan of land taken, have been filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Amendment to Complaint—Filed March 4, 1957

Comes now the United States of America and for amendment to its complaint heretofore filed in this cause, states:

1. That in addition to the interests condemned in the tracts of land described in the original complaint and Declaration of Taking No. 1 filed herein, there is hereby included in this action the interests hereinafter specified in Tracts designated No. A-141, No. A-141E, No. A-142 and No. A-142E and described in Exhibit "B" attached hereto.

2. This amendment to complaint is filed by the United States of America at the request of the Under Secretary of the Air Force for the taking of property under power of eminent domain for military purposes and for the ascertainment and award of just compensation to the owners and parties in interest. The public uses for which said land is taken are: The land is necessary adequately to provide for the establishment of additional facilities for the use of the Department of the Air Force and other military uses incident thereto in connection with the Clinton-Sherman Air Force Base, Washita County, Okla-

homa, and for such other use as may be authorized by Congress or by Executive Order.

3. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257, Sections 2663 and 9773 of Title 10, United States Code, the Act of Congress approved August 3, 1956 (Public Law 968—84th Congress) and the Act of Congress approved July 27, 1956 (Public Law 814—84th Congress).

4. The interest in the property to be acquired is:

(1) As to Tracts No. A-141 and A-142, the fee simple title thereto, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

(2) As to Tracts Nos. A-141E and A-142E, the following rights:

(a) The continuing perpetual right to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon, extending into, extending above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as described in Schedule "Z" attached hereto.

(b) The continuing perpetual right to remove, to raze, to destroy, and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above, the Glide Angle Plane and/or Transitional Surface as described in Schedule "Z".

(c) The right of ingress to, egress from, and passage on the lands described in Exhibit "B" hereto for the purpose of exercising the rights hereby taken for said public
25 uses. Reserving, however, to the landowners, their heirs, executors, administrators, successors and assigns, all rights, titles, interests, and privileges as may be

exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses;

subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is described in Exhibit "B" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

Tract No. A-141 and Tract No. A-142

Charles J. Higginbotham and Jennie P. Higginbotham, his wife,	Sentinel, Oklahoma
Federal Land Bank of Wichita	Wichita, Kansas
Phillips Petroleum Company,	Bartlesville, Oklahoma
Walter Schneider and Elizabeth Schneider, his wife,	Address Unknown
J. L. Galloway	Address Unknown
Eddie Greteman, tenant	Foss, Oklahoma

Tract No. A-142 and Tract No. A-142E

Robert E. Davis and Mamie Davis, his wife,	Burns Flat, Oklahoma
Magnolia Petroleum Company	Oklahoma City, Oklahoma
Ed Taylor, tenant	Burns Flat, Oklahoma
L.M. Jones Construction Company	2125 SW 19th St. Oklahoma City, Oklahoma

26 Lufkin Construction Company, Inc. Box 717. Lufkin, Texas.
Peter Kiewit Sons Company 2926 N.W. 39th Street Oklahoma City, Oklahoma
Nolan Bros. P. O. Box 29, Elk City, Okla.

7. The Board of County Commissioners of Washita County, Oklahoma, the County Treasurer of Washita County, Oklahoma, and the State of Oklahoma may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named there are or may be *otjers* whose names are unknown to plaintiff and such persons are made parties to this action under the designation "Unknown Owners."

Wherefore, the plaintiff demands judgment that the property be condemned and just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

PAUL W. CRESS
United States Attorney
Western District of Oklahoma

H. DALE COOK
Assistant United States Attorney
Western District of Oklahoma

Trial by jury of the issue of just compensation is demanded by plaintiff.

Clerk's Note re Exhibit "B"

The land which is the subject matter of this proceeding in condemnation referred to in 5 of the Amendment
27 to Complaint and in Declaration of Taking No. 2, situate and being in Washita County, Oklahoma, is described as follows:

The descriptions are set out in schedule A to the declaration of taking No. 2 which appears at page 29.

Clerk's Note re Schedule Z

Schedule Z is identical with the schedule, attached to the Complaint, which appears at page 9.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Declaration of Taking No. 2—Filed March 4, 1957

To The Honorable The United States District Court:

I, the undersigned, James H. Douglas, Under Secretary of the Air Force of the United States of America, do hereby make the following declaration by direction of the Secretary of the Air Force:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257), Sections 2663 and 9773 of Title 10, United States Code, which authorize the acquisition of land for military purposes, the Act of Congress approved August 3, 1956 (Public Law 968—84th Congress), which act authorizes acquisition of the land, and the Act of Congress approved July 27, 1956 (Public Law 814—84th Congress), which act made funds available for such purposes.

(b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for the establishment of additional facilities for the
28 use of the Department of the Air Force and for other military uses incident thereto. The said land has been selected under the direction of the Secretary of the Air Force for acquisition by the United States for use in connection with Clinton-Sherman Air Force Base, Washita County, Oklahoma, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part

hereof, and is a description of part of the same land described in the Complaint in the above-entitled cause.

3. The estates taken for the public use are as follows:

(1) As to Tracts Nos. A-141 and A-142, the fee simple title thereto, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

(2) As to Tracts Nos. A-141E and A-142E, the following rights:

(a) The continuing perpetual right to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon, extending into, extending above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as described in Schedule "Z."

(b) The continuing perpetual right to remove, to raze, to destroy, and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above the Glide Angle Plane and/or Transitional Surface as described in Schedule "Z."

29 (c) The right of ingress to, egress from, and passage on the lands described in Schedule "A" for the purpose of exercising the rights hereby taken for said public uses. Reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns, all rights, titles, interests, and privileges as may be exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses.

Subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

4. A plan showing the land taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by the undersigned as just compensation for the said land, with all buildings and improvements thereon and all appurtenances thereto and in-

cluding any and all interests hereby taken in said land is set forth in Schedule "A" herein, which sum the undersigned causes to be deposited herewith in the registry of the court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

In Witness Whereof the Undersigned, the Under Secretary of the Air Force, hereunto subscribes his name by direction of the Secretary of the Air Force, this 16th day of February, A. D. 1957, in the City of Washington, District of Columbia.

JAMES H. DOUGLAS
Under Secretary of the Air Force

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30 **Schedule "A" to Declaration of Taking No. 2**

The land which is the subject matter of this Declaration of Taking aggregates 139.12 acres, more or less, situate and being in Washita County, Oklahoma, and is part of the same land described in the Complaint filed in the condemnation proceeding. Description of the land taken, the names of purported owners thereof, and statements of the sums estimated to be just compensation therefor, are as follows:

Tract No. A-141

Indian Meridian T. 10 N., R. 19 W., Section 27, A tract of land in the NE ¼ NW ¼, more particularly described as: Beginning at a point on the north line of said Section 27, said point being 30.0' west of the north quarter corner of said Section 27; thence south and parallel to the east line of said NE ¼ NW ¼ 780.0 feet to a point; thence west and parallel to the north line of said NE ¼ NW ¼ 1290.0 feet to a point on the west line thereof; thence north along said west line 780.0 feet to the northwest corner of said NE ¼ NW ¼; thence east along the north line of said NE ¼ NW ¼ 1290.0 feet to the point of beginning. The area described aggregates 23.10 acres, more or less, situate in Washita County, Oklahoma.

Estimated Compensation: $3,500.00.

Tract No. A-141E

Indian Meridian T. 10 N., R. 19 W., Section 27, SE ¼ NW ¼ and the south 540.0 feet of the NE ¼ NW ¼, and the east 30.0 feet of the north 780.0 feet of the NE ¼ NW ¼. The area described aggregates 56.90 acres, more or less, situate in Washita County, Oklahoma.

Estimated Compensation: $1,150.00.

Names of Purported Owners:	Addresses of Purported Owners:
Charles J. Higginbotham, and Jennie P. Higginbotham, his wife	Sentinel, Oklahoma
31 Federal Land Bank of Wichita	Wichita, Kansas
Phillips Petroleum Company	Bartlesville, Oklahoma
Walter Schneider, and Elizabeth Schneider, his wife	Unknown
J. L. Galloway	Unknown
Eddie Greteman, tenant	Foss, Oklahoma

Tract No. A-142

Indian Meridian T. 10 N., R. 19 W., Section 27, A tract of land in the NW ¼ NW ¼, more particularly described as: Beginning at the northeast corner of said NW ¼ NW ¼; thence south along the east line of said NW ¼ NW ¼ 780.0 feet to a point; thence west and parallel to the north line of Said NW ¼ NW ¼ 865.0 feet to a point; thence north and parallel to the west line of said NW ¼ NW ¼ 780.0 feet to a point on the north line of said NW ¼ NW ¼; thence east along said north line 865.0 feet to the point of beginning, aggregating 15.49 acres, more or less, situate in Washita County, Oklahoma.

Estimated Compensation: $2,550.00.

Tract No. A-142E

Indian Meridian T. 10 N., R. 19 W., Section 27, N ½ SW ¼ NW ¼ and that part of the NW ¼ NW ¼ described as follows: Beginning at the southwest corner thereof; thence north along the west line of said NW ¼ NW ¼ 1100.0 feet to a point; thence east and parallel to the north line of said NW ¼ NW ¼ 175.0 feet to a point; thence north and parallel to said west line 220.0 feet to a point on the north line of said NW ¼ NW ¼; thence east along said north line 280.0 feet to a point; thence south and parallel to said west line 780.0 feet to a point; thence east and parallel to said north line 865.0 feet, more or less, to a point on the east line of said NW ¼ NW ¼; thence south along said east line 540.0 feet to the southeast corner of said NW ¼ NW ¼; thence west along the south line
32 thereof to the point of beginning. The area described aggregates 43.63 acres, more or less, situate in Washita County, Oklahoma.

Estimated Compansation: $50.00.

Names of Purported Owners:	Addresses of Purported Owners:
Robert E. Davis, and Mamie Davis, his wife	Burns Flat, Oklahoma
Magnolia Petroleum Company	Oklahoma City, Oklahoma
Ed Taylor, tenant	Burns Flat, Oklahoma

The gross sum estimated to be just compensation for the land hereby taken is $7,250.00.

Clerk's Notes re Schedule Z and Exhibit B

Schedule Z is identical with the schedule attached to the Complaint, which appears at page 9.

Three copies of exhibit B, plan showing land taken, which is identical with exhibit B to declaration of taking No. 1 have been filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Motion for Delivery of Possession—Filed March 2, 1957

Plaintiff moves the Court for an order requiring all defendants to this action and any and all persons in possession or control of the property described in the Amendment to Complaint and Declaration of Taking No. 2 filed herein, designated Tracts A-141, A-141E, A-142 and A-142E, to surrender possession of said property, to the extent of the estate to be condemned, to plaintiff immediately, and as grounds therefor plaintiff states:

1. The Secretary of the Air Force of the United States of America has found and determined that it is necessary and advantageous to the interests of plaintiff to acquire such possession.

33 2. Plaintiff is entitled to such possession as a matter of right.

H. DALE COOK
Assistant United States Attorney
Western District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Order for Delivery of Possession—March 4, 1957

This action coming on for hearing ex parte upon motion of plaintiff for an order for the surrender of possession of the property described in the amendment to complaint and declaration of taking No. 2 filed herein, designated Tracts Nos. A-141, A-141E, A-142 and A-142E, to plaintiff, and it appearing that plaintiff is entitled to possession of said property, with the exception hereinafter noted,

It Is This 4th day of March, 1957, Adjudged that all defendants to this action and all persons in possession or control of the property described in the amendment to complaint and declaration of taking No. 2 filed herein, shall surrender possession of the said property to the extent of the estate being condemned to plaintiff immediately, provided that a copy of this order shall be served

upon all persons in possession or control of said property forthwith, excepting the tenant of Tract No. A-142, Ed Taylor, who shall be permitted to continue residing thereon until the 4th day of April, 1957, at which time he shall vacate said premises.

STEPHEN S. CHANDLER
United States District Judge

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34 IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Motion for Appointment of and Trial By Commissioners—Filed August 6, 1959

Defendants respectfully move the Court for appointment of and trial by commissioners pursuant to Rule 71A, and in support thereof show the Court:

1. That by reason of the character, location and quantity of the property to be condemned, and for other reasons in the interest of justice, all as detailed in particularity hereinafter and in the affidavit attached hereto and made a part hereof, the Court should appoint commissioners and order trial by commissioners in this cause.

2. This action primarily seeks condemnation of a perpetual clearance easement over numerous separate tracts, so that the character of the property rights and particular properties involved are of an unusual character, as the affidavit shows; a part of the property rights sought to be condemned also include ownership in fee simple; said tracts extend over an area more than five miles in length in the western portion of Washita County, Oklahoma, and involve various types of real estate of differing topography.

3. Said tracts are located over 100 miles from Oklahoma City, Oklahoma; all of the affiants joining in said affidavit live in the vicinity of said tracts; most of the witnesses and all of the records involved in the action are located in said Washita County; in the interest of a fair trial for the parties, it will be necessary for the trier of fact to be given a view and inspection of the numerous separate properties involved, their differing locations and conditions, and the nature of the effect of the varying easements sought

to be imposed; and it will involve substantial expense and inconvenience for trial of said cause by jury in Oklahoma City, Oklahoma to be had.

4. The quantity of the property involved, as appears from the pleadings and references in said affidavit, requires appointment of and trial by commissioners in the interest of justice.

Wherefore, defendants respectfully move that the Court appoint commissioners and order trial by commissioners to be had in this action.

MEACHAM, MEACHAM & MEACHAM

EMBRY, CROWE, TOLBERT, BOXLEY & JOHNSON

By WM. J. HOLLOWAY, JR.
Attorneys for Defendants

Affidavit—June 3, 1959

State of Oklahoma, County of Custer, :ss

The undersigned, and each of them, being first duly sworn, state that they are each defendants in a condemnation proceedings in Civil Action No. 7007 in the United States District Court for the Western District of Oklahoma in which action the United States of America is plaintiff and in which action a perpetual clearance easement is imposed on the real estate of these defendants prohibiting the use by them of specifically described portions of the air space at varying heights from the ground surface; that the Complaint and Amended Complaint refers to the Tracts involved by numbers and specifically describe s each numbered Tract; that said Tracts so described will be referred to in this affidavit by said Tract numbers; that the undersigned Louis T. Merz and Leo J. Merz are the owners of Tract A-104E, containing 134.7 acres, and referred to in the Complaint; that the undersigned W. E. Guthrie is the owner of Tract A-106E, containing 83.70 acres, and referred to in the Complaint; that the undersigned John Kerkhoff is the owner of Tract A-107E, containing 80.10 acres, and referred to in the Complaint;

that the undersigned Robert E. Davis is the owner
36 of Tract A-118E, containing 50.25 acres, referred to in the Complaint and Tract A-142 (which is condemned for fee simple title), containing 15.49 acres, and Tract A-142E, both of which latter Tracts are referred to in the Amendment to Complaint; that the undersigned E. E. Smith is the owner of Tract A-119E, containing 138.73 acres, referred to in the Complaint; that the undersigned Bertha Rogers is one of the owners of Tract A-122E, containing 11.52 acres, referred to in the Complaint; that the undersigned R. B. Hoover is the son of Ella B. Hoover, who is the owner of Tract A-124E, referred to in the Complaint; that this Affidavit is made in regard to all of the Tracts hereinabove specified and also as to the mineral interests in and under Tract A-123E; that said Tracts cover an area more than five miles long located in the western portion of Washita County, Oklahoma, more than 100 miles from Oklahoma City; that there are various types of real estate included in the Tracts, with differing topography; that all of the undersigned live in the vicinity of the Tracts; that most of the witnesses and all of the records involved in the condemnation proceedings are located in Washita County; that it will be very expensive and most inconvenient to hold the trial of said Cause in Oklahoma City; that it is necessary for the trier of the facts in regard to said proceedings to actually view and inspect the real estate involved in order to be fully apprised as to what will constitute just compensation to the owners of said real estate and for said owners to be fairly and justly compensated for their damages; and that justice would be best served, for the reasons herein set forth, if commissioners are appointed for the trial of said cause.

Dated this June 3 1959.

LOUIS T. MERZ
LEO J. MERZ
W. E. GUTHRIE
JOHN KERKHOFF
ROBERT E. DAVIS
E. E. SMITH
BERTHA ROGERS
R. B. HOOVER

36

37 Subscribed and sworn to before me this June 3, 1959.

(Seal) FLORENCE ERWIN
(Notary Public

My commission expires 11-26-1959.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Order Appointing Commissioners—August 6, 1959

Upon consideration of the motion of defendants for appointment of and trial by commissioners made orally thereto at pre-trial and renewed in writing; the showing made in support thereof including the affidavit attached to said motion; the objections by the plaintiff made heretofore and renewed hereto; and the argument of counsel thereon; the Court finds:

That by reason of the character, location and quantity of the property to be condemned and other reasons appearing in the interest of justice, the issue of compensation should be determined by a commission of three persons to be appointed by the Court; that there are numerous tracts involved in said action; there are varying and differing perpetual clearance easements sought as to some tracts, and the taking in fee of other real estate involved; that the location, quantity and differing conditions of topography and uses of said land further require such trial; that it would be burdensome upon defendants and a substantial number of their witnesses to have trial by jury in Oklahoma City, Oklahoma over 100 miles from the location of said lands; that it would be expensive and inconvenient for a jury to be given a view of said properties, as justice will require; and that the more convenient, expeditious and fairest method of trial will be by commissioners.

It is therefore Ordered that trial of the issue of compensation in this cause be by a commission of three
38 persons appointed by the Court; that said trial shall be had commencing on September 8, 1959, in the vicinity of Clinton, Oklahoma, at a location to be designated in writing by said commissioners, with reasonable notice

thereof to the parties; and that the following persons are hereby appointed as commissioners to conduct said hearing and make report thereupon to the Court:

Mr. Stansell E. Whiteside 309 Badger-Henry Bldg., Altus, Okla.
Mr. Finis C. Gillespie, 108 ½ E. 4th, Hobart, Okla.
Mr. Jerry Tisdal, Cordell, Oklahoma.
Done this 6th day of August, 1959.

STEPHEN S. CHANDLER
United States District Judge

O.K. As To Form George Camp Assistant United States Attorney, Wm. J. Holloway, Jr. Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Report of Commission—Filed November 9, 1959

Comes Now the undersigned, Stansell E. Whiteside, Finis C. Gillespie and Jerry Tisdal, a commission appointed by this court, and do now respectfully report:

That pursuant to an order of this court made and entered on the 6th day of August, 1959, the above entitled cause was referred to the undersigned, as a commission; that pursuant to said order and the directions contained therein, said commission did notify all interested parties that a hearing would be held on the 8th day of September,
39 1959, at Clinton, Oklahoma; that said hearing was attended by Paul G. Cress, United States Attorney and George Camp, as attorneys for the condemnor; that the defendants were represented by their attorneys, Meacham, Meacham & Meacham, insofar as the following tracts of land were concerned:

Tract A-104E.....	Value of the Clearance asement
Tract A-106E.....	Do
Tract A-107E.....	Do
Tract A-118E.....	Do
Tract A-119E.....	Do
Tract A-122E.....	Do

Tract A-123E.....	Do
Tract A-124E.....	Do
Tract A-142E.....	Do
Tract A-142	Value of the Fee

Whereupon, the parties having announced ready for trial, the matter proceeded to trial, and various witnesses who were duly sworn, were called to testify, and the commission having personally viewed the lands in question and having heard the testimony and evidence presented by the parties, hereby evidences it decision and makes its report thereon to this court as follows:

First

We, the undersigned commission, assess and fix the damage and the fair cash market value of the interest of the estate in the following described real property, as appropriated by the United States of America on March 8, 1956, forthe uses and purposes defined in the Declaration of Taking filed herein, to-wit:

Tract No. A-104E

Indian Meridian T. 10 N., R. 19 West, Section 3, A tract of land in the Southwest Quarter more particularly
40 described as Beginning at a point on the South line of said Southwest Quarter, said point being 250.0 feet East of the Southwest corner of said Southwest Quarter; thence north and parallel with the West line of said Southwest Quarter 1940.0 feet to a point; thence Northwesterly on a straight line to a point on the North line of said Southwest Quarter, said point being 162.5 feet East of the Northwest corner of said Southwest Quarter; thence East along said North line 2375.0 feet to a point, said point being 102.5 feet West of the Northeast corner of said Southwest Quarter; thence Southwesterly on a straight line to a point 700.0 feet South and 190.0 feet West of the Northeast corner of said Southwest Quarter; thence South and parallel to the East line of said Southwest Quarter 1940.0 feet to the South line of said Southwest Quarter; thence West along said South line 2200.00 feet to the point of beginning.

The area described aggregates 134.70 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed $16,718.00

Tract No. A-106E

Indian Meridian T. 10 N., R. 19 W., Section 3, A tract of land in Lot 2, Lot 3 and Southeast Quarter of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter more particularly described as: Beginning at the Northwest corner of said Lot 3; thence East along the North line of said Lot 3 and said Lot 2 a distance of 1547.5 feet to a point, said point being 227.5 feet East of the North Quarter corner of said Section 3; thence Southwesterly on a straight line 2660.55 feet, more or less, to a point on the East-West quarter line of said Section 3, said point being 102.5 feet West of the center of said Section 3; thence West along said East-West quarter line 1217.5 feet to the Southwest corner of said Southeast Quarter of the Northwest Quarter; thence North along the West line of said Southeast Quarter of the Northwest Quarter, and the West line of said Lot 3, a distance of 2640 feet, more or less, to the point of beginning.

41 The area described aggregates 83.70 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 5,261.00

Tract No. A-107E

Indian Meridian T. 10 N., R. 19 West, Sections 3 and 4 A tract of land being part of Lot 4 and part of the Southwest Quarter of the Northwest Quarter of Section 3, and part of Lot 1 and part of the Southeast Quarter of the Northeast Quarter of Section 4 and more particularly described as: Beginning at the Northeast corner of said Lot 4, Section 3; thence South along the East line of said Lot 4 and the East line of said Southwest Quarter of the Northwest Quarter 2640.0 feet, more or less, to the Southeast corner of said Southwest Quarter of the Northwest Quarter; thence West along the South line of said Southwest Quarter of the Northwest Quarter 1157.5 feet to a point; thence Northwesterly on a straight line 2660.55

feet, more or less, to a point on the North line of said Lot 1, Section 4, said point being 167.5 feet West of the Northeast corner of said Section 4; thence East along said North line and the North line of said Section 3, a distance of 1487.5 feet to the point of beginning.

The area described aggregates 80.10 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 5,333.00

Tract No. A-118E

Indian Meridian T. 10 N., R. 19 West, Section 27. A tract of land in the Northwest Quarter of the Northwest Quarter and the North Half of the Southwest Quarter of the Northwest Quarter more particularly described as: Beginning at the Northeast corner of the Northwest Quarter of the Northwest Quarter; thence South along the
42 East line of said Northwest Quarter of the Northwest Quarter and the North Half of the Southwest Quarter of the Northwest Quarter 1980.0 feet to the Southeast corner of said North Half of the Southwest Quarter of the Northwest Quarter; thence west along the south line of said North Half of the Southwest Quarter of the Northwest Quarter 1202.5 feet to a point; thence northeasterly on a straight line 1068.25 feet to a point, said point being 400.00 feet North and 250.0 feet East of the Southwest corner of the Northwest Quarter of the Northwest Quarter; thence North 920.0 feet to a point on the North line of said Northwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of the Northwest Quarter, said point being 250.0 feet East of the Northwest corner thereof; thence East along said North line 1070.0 feet to the point of beginning.

The area described aggregates 50.25 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 4,900.00

Tract No. A-119E

Indian Meridian T. 10 N., R. 19 W., Section 27 Northeast Quarter of the Southwest Quarter, Southwest Quarter of the Southwest Quarter, and all that part of the Northwest

Quarter of the Southwest Quarter and the South Half of the Southwest Quarter of the Northwest Quarter more particularly described as: Beginning at the Northeast corner of said South Half of the Southwest Quarter of the Northwest Quarter; thence South along the East line of said South Half of the Southwest Quarter of the Northwest Quarter and the East line of said Northwest Quarter of the Southwest Quarter 1980 feet to the Southeast corner of said Northwest Quarter of the Southwest Quarter; thence West along the South line of said Northwest Quarter of the Southwest Quarter 1320 feet to the Southwest corner thereof; thence North along the West line of said Northwest Quarter of the Southwest Quarter 1040 feet to a point, said point being 280 feet South of the Northwest corner thereof; thence Northeasterly on a straight line
43 947.32 feet to a point on the North line of said South Half of the Southwest Quarter of the Northwest Quarter, said point being 117.5 feet East of the Northwest corner thereof; thence East along said North line 1202.5 feet to the point of beginning.

The area described aggregates 138.73 acres more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 8,500.00

Tract No. A-122E

Indian Meridian T 10 N., R. 19 W., Section 27 A tract of land in the West Half of the West Half of the Southeast Quarter more particularly described as: Beginning at the South quarter corner of said Section 27; thence North along the North-South quarter line of said Section 27 2640 feet to the center of said Section 27; thence East along the East-West quarter line 25 feet to a point; thence Southeasterly on a straight line 2660.55 feet to a point on the South line of said Section 27, said point being 355 feet East of the south quarter corner thereof; thence West along said South line 355 feet to the point of beginning

The area described aggregates 11.52 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 2,387.00

Tract No. A-123E

Indian Meridian T. 10 N., R. 19 West, Section 28 A tract of land in the East Half of the East Half of the Southeast Quarter more particularly described as: Beginning at the Southeast corner of said Section 28; thence West 295 feet along the South line of said Section 28 to a point; thence Northeasterly on a straight line 2378.37 feet to a point on the East line of said Section 28, said point being 280 feet South of the East Quarter corner thereof; thence
44 South along said East line 2360 feet to the point of beginning.

The area described aggregates 7.99 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 100.00

Tract No. A-124E

Indian Meridian T. 10 N., R. 19 W., Section 27 The Southeast Quarter of the Southwest Quarter

The area described aggregates 40 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 4,100.00

Second

We, the undersigned commission, *asses* and fix the damage and the fair cash market value of the interest and estate in the following described real property, as appropriated on March 4, 1957 for the uses and purposes defined in the Amended Complaint and Declaration of Taking filed herein, to-wit:

Tract No. A-142E

Indian Meridian T. 10 N., R. 19 W., Section 27 North Half of the Southwest Quarter of the Northwest Quarter and that part of the Northwest Quarter of the Northwest Quarter described as follows: Beginning at the southwest corner thereof; thence north along the west line of said Northwest Quarter of the Northwest Quarter 1100.0 feet to a point; thence east and parallel to the north line of said Northwest Quarter of the Northwest Quarter 175.0 feet to a point; then North and parallel to said west line 220.0

feet to a point on the north line of said Northwest Quarter of the Northwest Quarter; thence east along said north line 280.0 feet to a point; thence south and parallel
45 to said west line 780.0 feet to a point; thence east and parallel to said north line 865.0 feet, more or less, to a point on the east line of said Northwest Quarter of the Northwest Quarter; thence south along said east line 540.0 feet to the southeast corner of said Northwest Quarter of the Northwest Quarter; thence west along the south line thereof to the point of beginning.

The area described aggregates 43.63 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 2,783.00

Tract No. A-142

Indian Meridian T. 10 N., R. 19 West, Section 27 A tract of land in the Northwest Quarter of the Northwest Quarter, more particularly described as: Beginning at the northeast corner of said Northwest Quarter of the Northwest Quarter; thence south along the east line of said Northwest Quarter of the Northwest Quarter 780.0 feet to a point; thence west and parallel to the north line of said Northwest Quarter of the Northwest Quarter 865.0 feet to a point; thence north and parallel to the West line of said Northwest Quarter of the Northwest Quarter 780.0 feet to a point on the north line of said Northwest Quarter of the Northwest Quarter; thence East along said north line 865.0 feet to the point of beginning,

Aggregating 15.49 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ..... $ 2,000.00

The commission finds that the defendant owners of Tract A-142 failed to make any adequate proof that any portion of said lands had any value except for agricultural purposes as of March 4, 1957 other than for uses caused solely by the acts of the condemnor in constructing an air base installation; that the evidence presented by said
46 owners concerning value of said land for a sand pit and the consequent sale of such sand for uses other than those brought about by the acts of the condemnor was

so speculative and conjectural that this commission could not properly determine any increased valuation of said property because of the presence of sand or other building materials upon said property.

Wherefore, we, the undersigned commission, do find that the above amounts as set forth by each individual tract is just compensation to be awarded the owners of said real estate by reason of the appropriation by the United States of America, and we recommend in this, our report, that this court enter a judgment and decree in favor of the defendant land owners in the amounts hereinbefore set forth; that the United States of America be decreed to pay the costs of this proceeding, including fees and charges of this commission.

Respectfully submitted this 23rd day of October, 1959.

STANSELL E. WHITESIDE
FINIS C. GILLESPIE
JERRY TISDAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Objections to Report of Commission—Filed November 18, 1959

Comes now the plaintiff, United States of America, and objects to the Report of the Commission dated October 23, 1959 and filed herein on November 9, 1959 in Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E, A-124E and A-142E for the following reasons:

1. That said awards of just compensation are grossly excessive and are not supported by the evidence.

47 2. The Report of the Commission is incomplete and deficient in that no findings of fact or conclusions of law are set forth therein as required by Rule 53, F.R.C.P.

3. That the Commission failed to rule on timely objections and certain motions affecting admissibility of evidence.

4. That the Report fails to have filed with it a transcript of the proceedings and of the evidence and the original

exhibits as is required by law to enable this Court to competently consider the Report of the Commission in order to ascertain whether or not it is "clearly erroneous" within the meaning of the law.

5. The Report fails to reflect whether the award as to each of the tracts is for the amount of just compensation for all interests in each tract, or is limited to be just compensation for that portion of each tract which was tried to the Commission.

6. The Commission failed to make a specific finding as to the value of the one-fourth mineral interest claimed by both Minard Henderson and Grace Henderson, his wife, and Louis T. Merz and Leo J. Merz in Tract No .A-104E, as requested by their attorney, Mr. Meacham.

7. That the Report fails to show that it was stipulated to by all the parties to the above tracts that the highest and best use of the land involved was for general agricultural purposes; and further that the report fails to reflect that all witnesses testified that the clearance easements did not impair the land from an agricultural standpoint, and all the landowners testified that their farming operations had not been impaired, changed or altered in any way as a result of the imposition of the clearance easements.

PAUL W. CRESS
United States Attorney
Western District of Oklahoma

GEORGE CAMP
Assistant United States Attorney

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48 IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Additional Report of Commission—Filed October 7, 1960

Comes now the undersigned, Stansell E. Whiteside, Finis Gillespie and Jerry *Tisdale*, commissioners appointed by this court in the above entitled cause and herewith supplement and add to the report of commissioners heretofore filed herein on November 9, 1959, as follows:

Said report of commissioners heretofore filed is hereby referred to and made a part hereof as if fully set forth herein.

Findings Of Fact

This commission makes the following specific findings of fact.

1. Plaintiff has taken a clearance easement over and across each of the tracts hereinafter set forth as set forth in the Complaint herein, with heights stipulated to be as follows:

Tract A-104E: 13 feet on the south line, 50 feet in the center, and 70 feet on the north line;

Tract A-106E: 71 feet on the south line to 163 feet on the north line;

Tract A-107E: 69 feet on the south line to 164 feet on the north line;

Tract 118E: 32 feet on the north line to 85 feet on the south line;

Tract 119E: 81 feet on the north line to 145 feet on the south line;

Tract 122E: 105 feet on the north line to 145 feet on the south line;

49 Tract 123E: 125 feet on the north line to 145 feet on the south line;

Tract 124E: 109 feet on the north line to 150 feet on the south line;

which tracts are described as set forth in the report of commissioners herein, which taking was on March 8, 1956, which heights are approximate and which heights would vary according to the conture of the lands;

2. Plaintiff has taken a clearance easement over and across Tract A-142 as set forth in the amended complaint, with heights stipulated to be 17 feet on the north side to 42 feet on the south side, which tract is described in the report of commissioners herein, which taking was on March 4, 1957, which heights are approximate and which heights vary according to the conture of the lands;

3. Plaintiff has taken Tract A-142 in fee, as set forth in the amended complaint, which tract was taken on March 4, 1957, and which tract is described as set forth in the report of the commissioners herein.

4. Said tracts are owned in fee simple as hereinafter set forth:

Tract No. 104-E:	Leo Merz and Lewis Merz;
Tract No. A-106E:	W. E. Guthrie;
Tract No. A-107E:	John Kerkoff;
Tract No. A-118E;	
Tract No. A-142E; and	
Tract No. A-142:	Robert Davis;
Tract No. A-119E:	E. E. Smith;
Tract No. A-122E:	Bertha Rogers, Juanita Nagel and Wanda Riggins;
Tract No. A-123E:	No evidence as to fee ownership;
Tract No. A-124E:	Ella B. Hoover;

5. The only interest involved in this hearing as to Tract A-123 is an undivided one-half of the oil, gas and other minerals in and under said real estate;

50 6. There was an oil and gas lease on each of Tracts A-106E, A-107E, A-118E, A-122E, A-123E, A-142E, and A-142 at the time each of said tracts was taken.

7. Minard Henderson owned an undivided one-fourth of the oil, gas and other minerals in and under Tract A-104E at the time of taking but was not entitled to participate in leasing, bonus, or delay rentals; however, it was stipulated and agreed between plaintiff and the defendants, Leo Merz, Lewis Merz and Minard Henderson, that no distinction would be made between said non-participating mineral interest as owned by Minard Henderson because of such non-participation, and that said mineral interest would be treated as a full one-fourth interest in the minerals by this Commission.

8. That the highest and best use of the land involved and as set forth in the said report of commissioners filed herein is for general agricultural purposes.

Conclusions Of Law

Our conclusions as to the law applicable are as follows:

First

The right of plaintiff to take the property involved is not disputed and the owner in each instance is entitled to just compensation for the taking of his or her property.

Second

The amount of just compensation for each land owner involved is the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking, being the *demunition* of said fair cash market value caused solely and directly by the taking;

51

Third

Any use of said area included in the clearance easements taken, such as by airplanes or otherwise, is in no way involved in this litigation and is not an item of damage herein;

Fourth

The motion of the government to strike the evidence of L. A. Wilcox was overruled and the motion of the government to strike the evidence of Robert Davis as to the sales of materials from Tract A-142 was sustained;

Judgment

The amount assessed as damages in the report of commissioners herein in each instance was the amount of just compensation for the land owners represented at said hearing and as set forth in paragraph three of the findings of fact herein. The amount assessed as damages in the report of commissioners included all of the mineral rights of each land owner, whether leased or unleased, except as to Tract A-104E and Tract A-123E. As to Tract A-104E the amount set forth in the said report of commissioners is the amount of just compensation to Leo Merz, Lewis Merz and Minard

Henderson, and the said Iminard Henderson's mineral interest is and damages are hereby declared to have been based on a mineral value of $30.00 per acre and the said Iminard Henderson damaged therefor in the total amount of $1,010.25, which damages should be and are hereby deducted from the assessment heretofore made on said Tract A104E in the amount of $16,718.00. As to Tract A-123E, the amount set forth in report of commissioners is the amount of just compensation to answering defendants owning an undivided one-half interest in and to the oil, gas and other minerals in and under said tract.

52 Respectfully submitted this 26th day of September, 1960.

STANSELL E. WHITESIDE
FINIS C. GILLESPIE
JERRY TISDAL

Compensation Claim

Stansell Whiteside	1½ days at $50.00	$ 75.00
"	Telephone Expense	1.75
"	Mileage-Altus to Hobart	7.00
	" Altus to Okla City	30.00
Stansel Whiteside (Total)		$113.75*
Finis C. Gillespie	½ day at $50.00	$ 25.00*
Jerry Tisdal	½ day at $50.00	25.00
"	Mileage-Cordell to Hobart	6.00
Jerry Tisdal	(Total)	$ 31.00*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Objections to Report of Commission and Additional Report of Commission—Filed October 14, 1960

Comes now the plaintiff the United States of America and objects to the Report of the Commission dated October 23, 1959, filed herein on November 9, 1959, and to the Additional Report of Commission dated September 26, 1960 and filed October 7, 1960 in Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E, A-124E, and A-142E for the following reasons:

1. The Government renews its objection to the appointment of a Commission as being an abuse of discretion by the Court, inasmuch as the character, location and quantity of the land would not warrant the Court's extraordinary action in denying the Government a trial by jury, which had been timely demanded.

2. The Reports wholly fail to make specific findings as to the facts on which the Commission based its valuation, and fail to show haw they applied applicable principles of law to the facts in reaching their ultimate conclusions.

3. The Reports wholly fail to show that all incompetent and inadmissible testimony was disregarded.

4. The Reports wholly fail to show how controverted testimony was resolved, if it were, in arriving at the valuations, and are therefore deficient and inadequate.

5. The Reports taken as a whole amount to no more than a general verdict of a jury, since no specific findings of any controverted issues were made, the only specific findings being as to those matters which were stipulated to by the parties to this action. Therefore the Reports are wholly inadequate to furnish an adequate basis for review by the Trial Judge or an Appellate Court.

6. The Reports are inadequate in that they fail to make a finding as to the ownership of the portion of Tract No. A-123E herein being litigated.

7. The Government renews its motion to strike the testimony of L. A. Willcox, which was erroneously overruled by the Commission after reserving ruling thereon for over a year, for the reasons stated in the record, which are as follows:

First, his demonstrated disregard for actual values. He has demonstrated a lack of knowledge of actual values as to the minerals. He has testified that there were no leases that he knew of in the township, and his only information was that he checked four or five leases starting five miles to the southwest to a distance of eight miles to the southwest, which leases he happened to know about by virtue of his mortgage files with his company. He further testified as to the minerals, that he had

no knowledge of the minerals that were transferred or reserved on the various sales that were actually consummated in this area. He was unfamiliar with the minerals on the land involved. He made no inquiry to ascertain mineral values except to Mr. Rainbolt, who he admitted had hedged and finally was of no value in giving him an opinion on which he could work with. His only other inquiry as to minerals was to an unnamed Anderson-Prichard man who Mr. Willcox admitted had no leases in the county, or knowledge of the immediate area involved, and that oil operations in Mr. Willcox's own words were "spotty" and that he had no knowledge whatsoever of the immediate area of which we are concerned as to the minerals.

He also demonstrated a lack of knowledge of actual values as to the surface. His testimony is based upon a theory entirely conjectural and speculative, being a creature of his own imagination. It conforms to no normal accepted or approved method of appraisal, and in addition is based upon a misunderstanding of the Government's taking. That the values reached were predetermined, and for which he admittedly *attempted* to find some method to substantiate them, and then totally disregarded local values, and fails to show a value based upon any concrete thing.

Further, that Mr. Willcox demonstrated a lack of actual qualifications to be entitled to qualify as an expert to express an opinion in this case. That neither on direct or cross-examination has he laid the necessary predicate or foundation to be considered by this Commission as a competent witness to testify as an expert as to land or mineral values. That he was *no* familiar with the land in the Declaration of Taking, and had never been on much of it, and had never examined the improvements or the soil, first seeing the tracts in 1958. That his base figure of $300.09 was set on land after its physical character had been changed, the house removed, it had been excavated, and which has been demonstrated was without basis in fact.

55 Further, that Mr. Willcox admittedly never checked any county records for assessed values, agricultural records nor aerial photos of the tracts involved, is not familiar with them; he did not consider the governmental soil maps available for the area, did not go on the area to

make an independent investigation of the soil, did not make an adequate inspection of the tracts or sales, most of which he was never upon, and that his inspection was only begun in 1958. That he has shown apparent misconception of market value, and testified that his value was not only based upon the sale of units of the ownership, but also a mineral value, later to be added together to reach a total value. He also improperly considered the value of the property as it happened to be affected by the managerial ability of the farm operator, which was improper, in that it failed to establish the market value attributed to the real estate, which factor is the only material one for the Commission.

That he failed to appraise the estates taken at a before and after market value, and subtracting an after market value, but admits he applied his private unsupported theory to reach a damage value. That the entire appraisal was based upon a basic value which Mr. Willcox has just now admitted which was based upon a tract of land which he never saw until subsequent to its physical characteristics having been substantially altered, which does not conform. It is basic value on this land to other lands, and therefore his entire theory is unsupported, incompetent, no foundation having been paid in fact for any element to which he applied his speculative theory, and this is true to all of the tracts.

8. The Government objects to said Reports for the reason that the awards of just compensation are grossly excessive and are not supported by the evidence.

PAUL W. CRESS
United States Attorney
Western District of Oklahoma

GEORGE CAMP
Assistant United States Attorney
Western District of Oklahoma

56 IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Letter from Stephen S. Chandler, U.S. District Judge, to Counsel—November 25, 1960

United States District Court Western District of Oklahoma Chambers Of Stephen S. Chandler, Chief Judge. Oklahoma City 1 November 25, 1960

Mr. George Camp Assistant United States Attorney P. O. Box 778 Oklahoma City 1, Oklahoma

Meacham, Meacham & Meacham Attorneys at Law Clinton, Oklahoma

Embry, Crowe, Tolbert, Boxley & Johnson Attorneys at Law First National Building Oklahoma City, Oklahoma

Mr. Stansell Whiteside Attorney at Law 309 Badger-Henry Building, Altus, Oklahoma

Re: 7007-Civil, United States v. 711.78 Arces, Washita Co., et al

Gentlemen: Upon consideration of the Report of Commissioners, Additional Report of Commissioners and the Objections thereto, I have come to the conclusion that the reports of the commissioners should be accepted and adopted by the court with one addition. The names of the persons entitled to receive the amount awarded for the mineral interest involved in Tract 123E are not set forth in the reports and this omission can be taken care of by amending the report to include the names of those persons or by designating them in the order of the court adopting the reports.

Counsel will kindly prepare a proper order for presentation and settlement on December 5.

Very truly yours,

STEPHEN S. CHANDLER

57 IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Judgment—January 13, 1961

Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E, A-124E, A-142E and A-142.

Now, on this 5th day of December, 1960, the above entitled cause comes on for hearing before the Honorable Stephen S. Chandler, Judge of the above styled Court, pursuant to regular assignment upon the Report of the Commission and Additional Report of Commission filed herein with respect to Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E, A-124E, A-142 and A-142E, and upon the objections thereto filed by the plaintiff, the plaintiff appearing by George Camp, Assistant United States Attorney, and the defendants, Louis T. Merz, Leo J. Merz, Minard Henderson and Grace Henderson, his wife, W. E. Guthrie and Bernice Guthrie, his wife, John Kerkhoff and Katherine H. Kerkhoff, his wife, Robert E. Davis and Mamie Davis, his wife, E. E. Smith and Pearl T. Smith, his wife, Ella B. Hoover, Edward Gunter, Bertha Kinney Rogers and F. G. Rogers, her husband, Juanita Kinney Nagel and Howard Nagel, her husband, Wanda Kinney Riggins and J. B. Riggins, her husband, W. S. Wallace, Charles O. Rivers and Myrtle Rivers, his wife, Earl Leverton, Nettie Edith Bryan, Wayne Armstrong, L. T. Armstrong, Mary Indiana Armstrong a/k/a Mary I. Armstrong a/k/a Mrs. T. H. Armstrong, Fay Kliewer, and Frank Kliewer, Jr., appearing by their attorneys, D. W. Meacham of the firm of Meacham, Meacham and Meacham, and William J. Holloway, Jr. of the firm of Embry, Crowe, Tolbert, Boxley & Johnson, their attorneys of record.

The Court having considered said Report of Commission and Additional Report of Commission and objections of plaintiff, and having heard arguments thereon, finds that said objections should be overruled and that said Report and Additional Report should be in all things approved and confirmed and adopted in all respects as the findings and judgment of this Court.

58 The Court finds that the United States of America had and has the right to condemn for public use for the establishment of additional facilities in connection with

Clinton-Sherman Air Force Base, Washita County, Oklahoma, and for such other uses as may be authorized by Congress or by Executive Order, the estates hereinafter set out in the tracts of land hereinafter specifically described, to-wit:

Tract No. A-104E

Indian Meridian T. 10 N., R. 19 W., Section 3, A tract of land in the SW ¼ more particularly described as: Beginning at a point on the South line of said SW ¼, said point being 250.0 feet East of the SW corner of said SW ¼; thence North and parallel with the West line of said SW ¼ 1940.0 feet to a point; thence Northwesterly on a straight line to a point on the North line of said SW ¼, said point being 162.5 feet East of the NW corner of said SW ¼; thence East along said North line 2375.0 feet to a point, said point being 102.5 feet West of the NE corner of said SW ¼; thence Southwesterly on a straight line to a point 700.0 feet South and 190.0 feet West of the NE corner of said SW ¼; thence South and parallel to the East line of said SW¼ 1940.0 feet to the South line of said SW ¼; thence West along said South line 2200.0 feet to the point of beginning.

The area described aggregates 134.70 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-106E

Indian Meridian T. 10 N., R. 19 W., Section 3, A tract of land in Lot 2, Lot 3 and SE ¼ NW ¼ and the SW ¼ NE ¼ more particularly described as: Beginning at the Northwest corner of said Lot 3; thence East along the North line of said Lot 3 and said Lot 2 a distance of 1547.5 feet to a point, said point being 227.5 feet East of the North quarter corner of said Section 3; thence
59 Southwesterly on a straight line 2660.55 feet, more or less, to a point on the East-West quarter line of said Section 3, said point being 102.5 feet West of the center of said Section 3; thence West along said East-West quarter line 1217.5 feet to the Southwest corner of said SE ¼ NW ¼; thence North along the West line of said SE ¼ NW ¼ and the West line of said Lot 3 a distance of 2640 feet, more or less, to the point of beginning.

The area described aggregates 83.70 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-107E

Indian Meridian T. 10 N., R. 19 W., Sections 3 and 4, A tract of land being part of Lot 4 and part of the SW ¼ NW ¼ of Section 3, and part of Lot 1 and part of the SE ¼ NE ¼ of Section 4 and more particularly described as: Beginning at the NE corner of said Lot 4, Section 3; thence South along the East line of said Lot 4 and the East line of said SW ¼ NW ¼ 2640.0 feet, more or less, to the SE corner of said SW ¼ NW ¼; thence West along the South line of said SW ¼ NW ¼ 1157.5 feet to a point; thence Northwesterly on a straight line 2660.55 feet, more or less, to a point on the North line of said Lot 1, Section 4, said point being 167.5 feet West of the NE corner of said Section 4; thence East along said North line and the North line of said Section 3, a distance of 1487.5 feet to the point of beginning.

The area described aggregates 80.10 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-118E

Indian Meridian T. 10 N., R. 19 W. Section 27, A tract of land in the NW ¼ NW ¼ and the N ½ SW ¼ NW ¼ more particularly described as: Beginning at the NE corner of the NW ¼ NW ¼; thence South along the
60 East line of said NW ¼ NW ¼ and the N½ SW ¼ NW ¼ 1980.0 feet to the SE corner of said N ½ SW ¼ NW ¼; thence West along the South line of said N ½ SW ¼ N W ¼ 1202.5 feet to a point; thence Northeasterly on a straight line 1068.25 feet to a point, said point being 400.0 feet North and 250.0 feet East of the SW corner of the NW ¼ NW ¼; thence North 920.0 feet to a point on the North line of said NW ¼ NW ¼, and the N ½ SW ¼ NW ¼, said point being 250.0 feet East of the NW corner thereof; thence East along said North line 1070.0 feet to the point of beginning.

The area described aggregates 50.25 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-119E

Indian Meridian T. 10 N., R. 19 W., Section 27 NE ¼ SW ¼, SW ¼ SW ¼, and all that part of the NW ¼ SW ¼ and the S ½ SW ¼ NW ¼ more particularly described as: Beginning at the Northeast corner of said S ½ SW ¼ NW ¼; thence South along the East line of said S ½ SW ¼ NW ¼ and the East line of said NW ¼ SW ¼ 1980 feet to the Southeast corner of said NW ¼ SW ¼; thence West along the South line of said NW ¼ SW ¼ 1320 feet to the Southwest corner thereof; thence North along the West line of said NW ¼ SW ¼ 1040 feet to a point, said point being 280 feet South of the Northwest corner thereof; thence Northeasterly on a straight line 947.32 feet to a point on the North line of said S ½ SW ¼ NW ¼, said point being 117.5 feet East of the Northwest corner thereof; thence East along said North line 1202.5 feet to the point of beginning.

The area described aggregates 138.73 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-122E

Indian Meridian T. 10 N., R. 19 W., Section 27, A tract of land in the W ½ W ½ SE ¼ more particularly
61 described as: Beginning at the South quarter corner of said Section 27; thence North along the North-South quarter line of said Section 27, 2640 feet to the center of said Section 27; thence East along the East-West quarter line 25 feet to a point; thence Southeasterly on a straight line 2660.55 feet to a point on the South line of said Section 27, said point being 355 feet East of the South quarter corner thereof; thence West along said South line 355 feet to the point of beginning.

The area described aggregates 11.52 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-123E

Indian Meridian T. 10 N., R. 19 W., Section 28, A tract of land in the E ½ E ½ SE ¼ more particularly described as: Beginning at the Southeast corner of said Section 28; thence West 295 feet along the South line of said Section 28 to a point; thence Northeasterly on a straight line

2378.37 feet to a point on the East line of said Section 28, said point being 280 feet South of the East quarter corner thereof; thence South along said East line 2360 feet to the point of beginning.

The area described aggregates 7.99 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-124E

Indian Meridian T. 10 N., R. 19 W., Section 27, SE ¼ SW ¼

The area described aggregates 40 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-142E

Indian Meridian T. 10 N., R. 19 W., Section 27, N ½ SW ¼ NW ¼ and that part of the NW ¼ NW ¼ described as follows: Beginning at the southwest corner thereof; thence north along the west line of said NW ¼ NW ¼ 1100.0 feet to a point; thence east and parallel to the north line of said NW ¼ NW ¼ 175.0 feet to a point; thence north and parallel to said west line 220.0 feet to a point on the north line of said NW ¼ NW ¼; thence east along said north line 280.0 feet to a point; thence south and parallel to said west line 780.0 feet to a point; thence east and parallel to said north line 865.0 feet, more or less, to a point on the east line of said NW ¼ NW ¼; thence south along said east line 540.0 feet to the southeast corner of said NW ¼ NW ¼; thence west along the south line thereof to the point of beginning.

The area described aggregates 43.63 acres, more or less, situate in Washita County, Oklahoma.

Tract No. A-142

Indian Meridian T. 10 N., R. 19 W., Section 27, A tract of land in the NW ¼ NW ¼, more particularly described as: Beginning at the northeast corner of said NW ¼ NW ¼; thence south along the east line of said NW ¼ NW ¼ 780.0 feet to a point; thence west and parallel to the north line of said NW ¼ NW ¼ 865.0 feet to a point; thence north and parallel to the west line of said NW ¼ NW ¼ 780.0 feet to a point on the north line of said NW ¼

NW ¼; thence east along said north line 865.0 feet to the point of beginning, aggregating 15.49 acres, more or less, situate in Washita County Oklahoma.

The estate taken in said Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E, A-124E, and A-142E, is as follows:

(1) The continuing perpetual right to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs, or any other perennial growth or under-
growth infringing upon, extending into, extending
63 above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as hereinafter described.

(2) The continuing perpetual right to remove, to faze, to destroy and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above the Glide Angle Plane and/or Transitional Surface as hereinafter described.

(3) The right of ingress to, egress from, and passage on the lands above described for the purpose of exercising the rights hereby taken for said public uses. Reserving to the landowners, their heirs, executors, administrators, successors and assigns, all rights, titles, interests and privileges as may be exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses.

Subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

The Glide Angle Plane and Transitional Planes of Clinton-Sherman Air Force Base, Washita County, Oklahoma, are respectively defined as follows:

RUNWAY APPROACH ZONE

The runway approach zone is described as follows: Beginning at a point in the line of prolongation of the center line of the N-S Runway of the Clinton-Sherman Air Force Base, level with and 1000 feet distant from the end of said runway; thence to the right forming an interior

angle of 90° 00′ 00″ with the line of prolongation of the center line of the runway, 750 feet to a point; thence to the left forming an interior angle of 97° 07′ 30″ with the last mentioned line, 10,077.82 feet to a point; thence to the left forming an interior angle 82° 52′ 30″ with the last mentioned line, 4000 feet to a point; thence to the
64 left forming an interior angle of 82° 52′ 30″ with the last mentioned line, 10,077.82 feet to a point 750 feet from the point of beginning; thence to the left forming an interior angle of 97° 07′ 30″ with the said last mentioned line, 750 feet to the point of beginning.

Glide Angle Plane

The glide angle plane is a trapezoidal plane extending over the runway approach zone starting at an elevation equivalent to the center line elevation at the end of the runway and sloping upward from the narrower end at a rate of 1 foot vertically for each 50 feet horizontally.

TRANSITIONAL ZONES

The transitional zones lie on each side of the runway and on each side of and adjacent to the approach zones, as follows: (a) The zones lying along the runway, extend the entire length of the runway plus an additional 1,000 feet at each end. The inside lines lie parallel to, level with, and 750 feet distant, measured perpendicularly, from the center line of the runway. The outside lines are situated outward, measured perpendicularly, a horizontal distance of 1,300 feet from the center line of the runway. (b) The zones lying on each side of and adjacent to the runway approach zone above defined, begin at points 750 feet distant, measured perpendicular to the prolongation of the center line at a point 1,000 feet away from the end of the runway involved, thence continuing perpendicular to the prolongation of the center line 750 feet; thence away from the end of the runway forming an interior angle of 89° 08′ 30″ with the last mentioned line, 5,357.60 feet to a point on the outer boundary of the runway approach zone; thence towards the end of the runway, forming an interior angle of 70° 59′ 00″ with the last mentioned line, 5,398.70 feet along the outer boundary of the approach zone to the beginning.

Transitional Planes

The transitional planes extend upward and outward (a) from the inside of the transitional zones, along the
65 runway and prolongations thereof above defined, and (b) from the outside boundaries of the glide angle planes sloping upward at a rate of 1 foot vertically for each 7 feet horizontally, measured at right angles to the center-line of the runway involved.

The estate taken in said Tract No. A-142 is the fee simple title thereto, subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

The Court finds that title to the estate taken in said Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E and A-124E vested in the United States on March 8, 1956 upon the filing of Declaration of Taking No. 1 in this case and the deposit of estimated just compensation; and that the estates taken in Tracts Nos. A-142 and A-142E vested in the United States of America on March 4, 1957, upon the filing of Declaration of Taking No. 2 and the deposit of estimated just compensation therefor.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein, the defendants, Louis T. Merz and Leo J. Merz were the owners of Tract No. A-104E, subject to a mortgage in favor of the defendant The Prudential Insurance Company of America, to an oil and gas lease in favor of the defendant R. B. Hoover, and further subject to an undivided one-fourth non-participating mineral interest owned by the defendants Minard Henderson and Grace Henderson, his wife. The Court finds that defendants, The Prudential Insurance Company of America and R. B. Hoover have each filed disclaimers herein, and that the defendants, Louis T. Merz and Leo J. Merz, Minard Henderson and Grace Henderson, his wife, are the only persons entitled to compensation for the estate taken in said Tract No. A-104E.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein the defendants, W. E. Guthrie and Bernice Guthrie, his wife, were the owners of the fee simple title to Tract No. A-106E, subject only to
66 a mortgage in favor of the Federal Land Bank of

Wichita, Wichita, Kansas, and to an oil and gas lease dated January 7, 1949, for a term of ten years in favor of Peppers Refining Company, which lease was owned by Champlin Refining Company at the time of the filing of said Declaration of Taking. The Court finds that Champlin Refining Company has entered nito a stipulation with the plaintiff agreeing to accept the sum of $450.000 without interest, as total just compensation for its interest in the estate taken in said tract. The Court finds that the oil and gas lease dated December 20, 1919, for a term of five years in favor of Rita Oil Company has expired by its terms and that the defendant Rita Oil Company has no interest in Tract No. A-106E.

The Court finds that the defendants, Nick Schones and Mary Anna Schones, his wife, also known as Nick Shones and Mary Shones, have no interest in said Tract No. A-106E; and that the defendants, W. E. Guthrie and Bernice Guthrie, his wife, Federal Land Bank of Wichita, Wichita, Kansas, and Champlin Refining Company are the only persons entitled to compensation for the estate taken in said Tract No. A-106E.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein the defendants John Kerkhoff and Katherine H. Kerkhoff, his wife, were the owners of the fee simple title in and to Tract No. A-107E, subject only to an oil and gas lease dated January 7, 1949, in favor of Peppers Refining Company and thereafter assigned to Champlin Refining Company who held said lease at the time of the filing of said Declaration of Taking. The Court finds that no other person has any right, title or interest in and to the estate taken in said tract, and that the defendants John Kerkhoff and Katherine H. Kerkhoff, his wife, and Champlin Refining Company are the only persons entitled to compensation for the taking of said estate in Tract No. A-107E. The Court finds that Champlin Refining Company has entered into a stipulation with the plaintiff agreeing to accept the sum of $450.00
67 without interest, as total just compensation for its leasehold interest taken in said tract.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein the defendants, Robert E. Davis and Mamie Davis, his wife, were the owners of the

fee simple title in and to Tract No. A-118E, subject only to an oil and gas lease dated July 15, 1948, in favor of Magnolia Petroleum Company. The Court finds that the defendant, Ed Taylor, tenant, has filed disclaimer, and that the defendants, Robert E. Davis and Mamie Davis, his wife, and Magnolia Petroleum Company are the only persons entitled to compensation for the estate taken in said tract. The Court finds that the defendant, Magnolia Petroleum Company, has entered into a stipulation with the plaintiff agreeing to accept the sum of $350.00 without interest, as total just compensation for its interest in the estate taken in said tract.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein the defendants, E. E. Smith and Pearl T. Smith, his wife, were the owners of the fee simple title in and to Tract No. A-119E. The Court finds that the defendant, Champlin Refining Company, has no interest in said tract, the lease formerly held by it thereon having been released; that the defendant, Willis Stroud, tenant, has disclaimed any interest in said tract; and that the defendant, Edward Gunter, tenant, has no interest in the estate taken in said tract; and that the defendants, E. E. Smith and Pearl Smith, his wife, are the only persons entitled to compensation for the estate taken in said Tract No. A-119E.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein, the defendants, Bertha Kinney Rogers, Juanita Kinney Nagel and Wanda Kinney Riggins were each the owner of an undivided one-third interest in the fee simple title to Tract No. A-122E, subject
68 only to an oil and gas lease dated December 5, 1947, for a term of ten years in favor of Phillips Petroleum Company; that the defendant, W. S. Wallace, tenant, has no interest in the estate taken in said tract; that the defendant, Carl S. Ford, has disclaimed and said action has been dismissed as to him. The Court finds that the defendants, F. G. Rogers, Howard Nagel and J. B. Riggins, have no separate compensable interest in said tract, and that the defendants, Bertha Kinney Rogers, Juanita Kinney Nagel, Wanda Kinney Riggins and Phillips Petroleum Company are the only persons entitled to compensation for the estate taken in said tract. The Court finds that Phillips Petroleum

Company has entered into a stipulation with the plaintiff agreeing to accept the sum of $25.00 without interest, as total just compensation for its interest in the estate taken in said tract.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein, the defendant, Glenn O. McDonald, was the owner of the surface and one-half of the minerals in said Tract No. A-123E, and that said defendant has stipulated and agreed with the plaintiff to accept the sum of $37.50 without interest, as total just compensation for his interest in the estate taken in said tract.

The Court finds that the remaining one-half mineral interest was at said time owned by the following named defendants:

Charles O. Rivers and Myrtle Rivers, his wife,
Earl Leverton,
Nettie E. Bryan,
L. T. Armstrong,
Wayne Armstrong,

Mary Indiana Armstrong, also known as Mary I. Armstrong and Mrs. T. H. Armstrong, having inherited the same from W. C. Armstrong, deceased.

Fay Kliewer, having inherited the same from Frank G. Kliewer, deceased, who was also known as F. G. Kliewer,
69 and who was described in the Notice by Publication herein as F. G. Kilewar, and in the original notice in this action as F. G. Kilewar, all one and the same deceased person.

The Court finds that the defendants, W. C. Armstrong and Frank Kliewer a/k/a F. G. Kliewer a/k/a F. G. Kilewar and F. G. Kilewer, were deceased at the time of the filing of Declaration of Taking No. 1 and they are therefore dropped as defendants in this proceeding. The Court finds that the defendants, Frank Kliewer, Jr. and Atlantic & Pacific Oil Company have no interest in said Tract No. A-123E.

The Court finds that said Tract No. A-123E was subject to an oil and gas lease in favor of Phillips Petroleum Company and that Phillips Petroleum Company has entered into a stipulation with the plaintiff agreeing to accept the sum of $25.00 without interest, as total just compensation for its interest in said tract.

The Court finds that the defendants, Glenn O. McDonald, Charles O. Rivers, Myrtle Rivers, Earl Leverton, Nettie E. Bryan, L. T. Armstrong, Wayne Armstrong, Mary Indiana Armstrong a/k/a Mary I. Armstrong a/k/a Mrs. T. H. Armstrong, Fay Kliewer and Phillips Petroleum Company are the only persons entitled to compensation for the estate taken in said Tract No. A-123E.

The Court finds that at the time of the filing of Declaration of Taking No. 1 herein the defendant, Ella B. Hoover, was the owner of the fee simple title in and to Tract No. A-124E, subject to a mortgage in favor of the defendant, Federal Land Bank of Wichita, Wichita, Kansas; that the defendant, Edward Gunter, tenant, has no interest in the estate taken in said tract and that no other person has any interest therein and the defendants Ella B. Hoover and Federal Land Bank of Wichita, are the only persons entitled to compensation therefor.

The Court finds that at the time of the filing of Declaration of Taking No. 2, the defendants, Robert E.
70 Davis and Mamie Davis, his wife, were the owners of the fee simple title in and to Tracts Nos. A-142E and A-142, subject to the clearance easement as set out in Tract No. A-118E and subject to an oil and gas lease in favor of the defendant, Magnolia Petroleum Company. The Court finds that the defendants, L. M. Jones Construction Company, Lufkin Construction Company, Inc., Peter Kiewit Sons Company and Nolan Brothers, have each filed disclaimers herein; and the defendant, Ed Taylor, former agricultural tenant has no interest in the estate taken in said tract and that defendants, Robert E. Davis, Mamie Davis, his wife, and Magnolia Petroleum Company are the only persons entitled to compensation for the estates taken in said Tracts Nos. A-142E and A-142. The Court finds that the defendant Magnolia Petroleum Company has entered into a stipulation with the plaintiff agreeing to accept the sum of $25.00 without interest, as total just compensation for its interest in the estates taken in said Tracts Nos. A-142E and A-142.

It Is Therefore By The Court Ordered, Adjudged And Decreed that the award of the Commission as to the lands hereinabove described be and the same is hereby confirmed and approved in each and every respect by this Court and in the following amounts:

Tract No. A-104E	
Commission's Award	$16,718.00
Deposited	$ 7,165.00
Deficiency	$ 9,553.00
Tract No. A-106E	
Commission's Award	$ 5,261.00
Deposited	$ 1,450.00
Deficiency	$ 3,811.00
Tract No. A-107E	
Commission's Award	$ 5,333.00
Deposited	$ 1,400.00
Deficiency	$ 3,933.00
Tract No. A-118E	
Commission's Award	$ 4,900.00
Deposited	$ 1,050.00
Deficiency	$ 3,850.00
Tract No. A-119E	
Commission's Award	$ 8,500.00
Deposited	$ 3,700.00
Deficiency	$ 4,800.00
Tract No. A-122E	
Commission's Award	$ 2,387.00
Deposited	$ 100.00
Deficiency	$ 2,287.00
Tract No. A-123E	
Commission's Award	$ 100.00
Deposited	$ 12.50
Deficiency	$ 87.50
Tract No. A-124E	
Commission's Award	$ 4,100.00
Deposited	$ 1,000.00
Deficiency	$ 3,100.00

Tracts No. A-142E and A-142

Commission's Award	$ 4,783.00
Deposited	$ 2,575.00
Deficiency	$ 2,208.00

By reason of said awards by said Commission a total deficiency exists in the amount of $33,629.50, with interest on $31,421.50 thereof at 6% per annum from March 8, 1956 until paid, and interest on $2,208.00 thereof at 6% per annum from March 4, 1957 until paid.

Upon said deficiency amount being deposited, the Clerk of this Court is ordered to make distribution as follows:

Tract No. A-104E	
To Louis T. Merz, J. Merz, Minard Henderson and Grace Henderson, jointly	$1,010.25
To Louis T. Merz and Leo J. Merz, jointly	$8,542.75
Tract No. A-106E	
To W. E. Guthrie, Bernice Guthrie and Federal Land Bank of Wichita, Wichita, Kansas, jointly	$3,811.00
72 Tract No. A-107E	
To John Kerkhoff and Katherine H. Kerkhoff, jointly	$3,933.00
Tract No. A-118E	
To Robert E. Davis and Mamie Davis, jointly	$3,850.00
Tract No. A-119E	
To E. E. Smith and Pearl T. Smith, jointly	$4,800.00
Tract No. A-122E	
To Bertha Kinney Rogers	$ 762.33
To Juanita Kinney Nagel	$ 762.33
To Wanda Kinney Rogers	$ 762.34
Tract No. A-123E	
To Charles O. Rivers and Myrtle Rivers, jointly	$ 54.68
To Earl Leverston	$ 5.47
To Nettie E. Bryan	$ 5.47
To L. T. Armstrong	$ 5.47

To Wayne Armstrong ..... $ 5.47
To Mary Indiana Armstrong a/k/a Mary I. Armstrong a/k/a Mrs. T. H. Armstrong ..... $ 5.47
To Fay Kliewer ..... $ 5.47

Tract No. A-124E
To Ella B. Hoover and Federal Land Bank of Wichita, Wichita, Kansas, jointly $3,100.00

with interest on each of said sums at 6% per annum from March 8, 1956 until paid.

Tracts No. A-142E and A-142
To Robert E. Davis and Mamie Davis, jointly $2,208.00

with interest on said amount at 6% per annum from March 4, 1957 until paid, plus $25.00 originally deposited for Tract No. A-142E and not heretofore withdrawn.

It Is Further Ordered, Adjudged And Decreed that pursuant to stipulations heretofore entered into, the following named defendants have and recover judgment against the United States of America in the sums set opposite their names, for the interest specified, to-wit:

73 Champlin Refining Company for its interest in the estate taken in Tract No. A-106E, the sum of $450.00 without interest,

Champlin Refining Company for its interest in the estate taken in Tract No. A-107E, the sum of $450.00 without interest,

Magnolia Petroleum Company for its interest in the estate taken in Tract No. A-118E, the sum of $350.00 without interest,

Phillips Petroleum Company for its interest in the estate taken in Tract No. A-122E, the sum of $25.00 without interest,

Glenn O. McDonald for the estate taken in his surface and one-half mineral interest in Tract A-123E, the sum of $37.50 without interest,

Phillips Petroleum Company for its interest in the estate taken in Tract No. A-123E, the sum of $25.00 without interest,

Magnolia Petroleum Company for its interest in the estates taken in Tracts No. A-142E and A-142, the sum of $25.00 without interest,

said leasehold interests not having been considered by the Commission, for the reason that said amounts had previously been agreed upon, and were not in controversy.

The amounts hereinabove awarded to Champlain Refining Company and Glenn O. McDonald having heretofore been disbursed, the Clerk of this Court is hereby ordered to make distribution of the amounts above set out as follows:

To Magnolia Petroleum Company, Tract No. A-118E	$350.00
Phillips Petroleum Company, Tract No. A-122E	$ 25.00
Magnolia Petroleum Company, Tract No. A-123E	$ 25.00
74 Magnolia Petroleum Company, Tracts No. A-142E and A-142	$ 25.00

Dated this 13th day of January, 1961.

STEPHEN S. CHANDLER
United States District Judge

O. K. George Camp 1/12/61 Assistant United States Attorney. Meacham, Meacham and Meacham By D. W. Meacham Attorneys for Defendants. Embry, Crowe, Tolbert, Boxley & Johnson By Wm. J. Holloway, Jr. Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Order Nunc Pro Tunc Correcting Judgment—January 16, 1961

Now, on this 16 day of January, 1961, it appearing to the Court from the motion of plaintiff that through clerical error in the judgment filed in this cause on January 13, 1961 the name "Magnolia Petroleum Company" appears in the tenth line on page 15 in connection with the disbursement for Tract No. A-123E, when in truth the correct payee

is Phillips Petroleum Company, and that said clerical error should be corrected nunc pro tunc.

It Is *Therefore* By The Court Ordered that the tenth line on page 15 of the judgment filed in this cause on January 13, 1961, be corrected nunc pro tunc to read as follows:

Phillips Petroleum Company, Tract No. A-123E, $25.00.

STEPHEN S. CHANDLER
United States District Judge

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75 IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Notice of Appeal—Filed March 14, 1961

Notice is hereby given that the United States of America, plaintiff above named, appellant herein, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment entered in this action on January 13, 1961, against the United States of America and in favor of the following named defendants, appellees herein, in the following tracts:

Louis T. Merz, Leo J. Merz, Minard Henderson and Grace Henderson, Tract No. A-104E; W. E. Guthrie, Bernice Guthrie and Federal Land Bank of Wichita, Wichita, Kansas, Tract No. A-106E; John Kerkhoff and Katherine H. Kerkhoff, Tract No. A-107E; Robert E. Davis and Mamie Davis, Tracts Nos. A-118E and A-142E; E. E. Smith and Pearl T. Smith, Tract No. A-119E; Bertha Kinney Rogers, Juanita Kinney Nagel and Wanda Kinney Riggins, Tract No. A-122E; Charlie O. Rivers and Myrtle Rivers, and Earl Leverton, Nettie E. Bryan, L. T. Armstrong, Wayne Armstrong, Mary Indiana Armstrong, a/k/a Mary I. Armstrong a/k/a Mrs. T. H. Armstrong, and Fay Kliewer, Tract No. A-123E; Ella B. Hoover and Federal Land Bank of Wichita, Wichita, Kansas, Tract No. A-124E.

GEORGE CAMP
Assistant United States Attorney
Western District of Oklahoma
Attorney for Appellant.

Clerk's Note re Order Extending Time for Docketing Cause

By order of April 20, 1961, the time for docketing the cause in the Court of Appeals was extended to June 12, 1961.

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76 **Transcript of Proceedings Before Commission**

Now, on the 8th day of September 1959, the above entitled hearing was held before a commission appointed by the court, composed of Stansell E. Whiteside, Finis C. Gillespie and Jerry Tisdal, insofar as the following tracts of land were concerned:

Tract A-104E	Value of the Clearance Easement
Tract A-106E	Do
Tract A-107E	Do
Tract A-118E	Do
Tract A-119E	Do
Tract A-122E	Do
Tract A-123E	Do
Tract A-124E	Do
Tract A-142E	Do
Tract A-142	Value of the Fee;

at Clinton, Oklahoma. That said hearing was attended by Paul G. Cress, United States Attorney and George Camp, as attorneys for the condemnor; that defendants were represented by their attorneys, Meacham, Meacham & Meacham, insofar as the above named tracts of land were concerned.

Witnesses were sworn and the following proceedings were had, to-wit:

Stipulation

It is hereby stipulated and agreed that the date of the taking under the Complaint which covers all of the tracts involved at this hearing, except Tract A-142 and Tract A-142-E, is March 8th, 1956. That the date of the taking under the Amendment to Complaint is March 4th, 1957, that pertains only to Tract A-142 and A-142-E.

It is further agreed that the easement taken by the Government is as set forth in the Complaint and the Amendment to Complaint.

77 It is further agreed that the approximate heights of the easements on each particular tract are as follows: Tract A-104-E, 13 feet on the south line, 50 feet in the center, and 70 feet on the north line; Tract A-106-E, 71 feet on the south line to 163 feet on the north line; Tract A-107E, 69 feet on the south line to 164 feet on the north line; Tract A-118E, 32 feet on the north line to 85 feet on the south line; Tract A-119E, 81 feet on the north line to 145 feet on the south line; Tract A-122E, 105 feet on the north line to 145 feet on the south line; Tract A-123E, 125 feet on the north line to 145 feet on the south line; Tract A-124E, 109 feet on the north line to 150 feet on the south line; Tract A-142 is a taking in fee. Tract A-142E, 17 feet on the north side to 42 feet on the south side.

Mr. Camp: It is agreed those are the approximate elevations of the glide angle plane above the surface of the various tracts in line with the center line of the runway extended. That they would vary according to the contour of the land.

Mr. Meacham: We offer in evidence Landowners' Exhibit "A", which is a Plan View of the South Approach Clearance Easements.

Mr. Camp: No objection.

Mr. Meacham: We offer in evidence Landowners' Exhibit "B", which is a Plan View of the North Approach Clearance Easements. We offer in evidence Landowners' Exhibit "C", which is a profile of the south approach clearance easements; and, Landowners' Exhibit "D" which is a profile of the north approach clearance easements.

Mr. Camp: No objection.

Mr. Whiteside: Those exhibits will be admitted in evidence.

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78 LEO MERZ, of lawful age, called as a witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination by Mr. Meacham:

Q. State your name? A. Leo Merz.

Q. Have you been sworn? A. Yes.

Q. Where do you live, Leo? A. I live a mile north and two miles west of Burns Flat.

Q. With reference to Tract A-104-E, which is 134.70 acres in the Southwest Quarter of Section Three, Township ten, North of Range Nineteen. Are you familiar with the Southewest Quarter of Section 3-10-19? A. I am.

Q. Do you own that tract of land? A. Me and my brother do.

Q. What is your brother's name? A. Louis Merz.

Q. Do you live on this tract of land? A. Yes.

Q. How long have you lived on it, Leo? A. I lived on it twelve (12) years.

Q. Twelve (12) years? A. Yes.

Q. Where did you live before that time? A. I lived right there by the side of it.

Q. How long have you lived in the area where this land is located? A. 42 years.

Q. In the 42 years that you have lived out there do you think you are able to determine the fair cash market value of real estate at that time in that area? A. I believe I can.

79 Q. Do you think you know the fair cash market value of this real estate? A. Yes.

Q. Do you think you knew the fair cash market value of this real estate on March 8, 1956, before this easement was imposed upon it? A. Yes.

Q. What was the fair cash market value of the entire Southwest Quarter on March 8, 1956?

Mr. Camp: We would object to him expressing an opinion on the basis that he is not qualified as an expert to express an opinion. There has been nothing shown here that he has the necessary qualifications to express an opinion as to the value of this land.

Mr. Meacham: If the Court please, he is the owner of the land, and the owner can always testify to the value of real estate, both in the Federal Court and the State Court.

Mr. Whiteside: I believe that is correct. He can base it upon his personal experience.

Mr. Camp: We would like a general objection on all of this line of testimony.

Q. What was the fair cash market value of this 160 acres on March 8, 1956? A. About $40,000.00.

Q. That is for the whole 160 acres? A. Yes.

Q. Is that its value before this easement was imposed upon it? A. Yes.

Q. Are you familiar with this easement? Have you read it, and are you familiar with what the Government has taken? A. Yes.

Q. Do you think the imposition of this easement on your property covering 134.70 acres decreases the fair cash market value of it? A. Yes. No, I don't.

80 Q. Do you think the easement reduces the value of your property or not? A. Yes, it reduced it.

Q. How much do you think the fair cash market value of this 160 acres was reduced by the imposition of this easement covering the 134.70 acres upon it? A. Better than half.

Q. In other words more than $20,000.00? A. Yes.

Q. Why do you say that the imposition of this easement, which in your case runs from 13 feet on the south line, 50 feet in the center line, and 70 feet on the north line, why do you say the imposition of that easement decreases the value of it $20,000.? A. Nobody wants to buy it.

Q. How do you know nobody wants to buy? A. Nobody comes around to buy.

Mr. Camp: We object to that line of questioning. What offers is objected to as incompetent, irrelevant and immaterial.

Mr. Meacham: If the Court please, I think the amount of any offer, we appreciate that would not be admissible.

Mr. Whiteside: If an offer was made to him he could testify to that, but the fact there hadn't been any offers, that wouldn't be admissible.

Q. What type of land was this 160 acres on March 8, 1956? A. Good land.

Q. How much was in cultivation? A. 138 acres.

Q. Was all of it just flat land, or was some of it a little bit rough? A. Just a little bit, about 10 acres.

Q. All but about 10 acres was flat? A. Yes.

81 Q. And 138 acres was in cultivation? A. Yes.

Q. Was there some improvements on the land?

A. Yes.

Q. What improvements? A. Two houses, a barn, chicken house, and a well, and that is all.

Q. Did the imposition of this easement necessitate you moving your improvements? Are they still where they were? A. No, we had them moved on the Southwest Corner.

Q. You had to move your improvements on account of this easement? A. Yes.

Q. What sort of crops do you grow out there? A. Feed and cotton.

Q. Feed and cotton? A. Yes.

Q. That is all.

Cross Examination by Mr. Camp:

Q. Mr. Merz, have you seen this sheet of paper, Government's Exhibit No. I? Do you see that? Is that a picture of your house? A. Yes.

Q. And a picture of your cattle shed? A. Yes.

Q. That is like it was at the time the government brought this lawsuit, isn't it? A. Yes.

Q. Now then, you say you moved this house? A. Yes.

Q. What did it cost you to move the house? A. Cost over $275.00.

Q. You haven't made any claim for that to anybody, you paid for that yourself, is that right? A. Yes.

82 Q. You and your brother paid for it? A. Yes, sir.

Q. The government didn't pay you anything for that? A. I don't know about that. Would that check come altogether?

Mr. Meacham: He is talking about his deposit in this case.

Q. You didn't ask your attorney to go make some claim for you for it? A. No.

Q. And you paid $275.00 to move your house? A. Yes.

Offers in Evidence

Mr. Camp: We move the admission of Government's Exhibit No. I.

Mr. Whiteside: That exhibit will be admitted.

* * * * *

Q. Mr. Merz, you moved the other outbuildings, didn't

you? A. Yes, and that expense included all of those buildings.

Q. I will show you what has been marked Government's Exhibit Two, which are some pictures. A. Those are my buildings.

Q. That is the way they were before the government brought this action? A. Yes.

Mr. Camp: We would move the admission of Government's Exhibit Two.

Mr. Meacham: No objection.

Mr. Whiteside: That exhibit will be admitted.

* * * * *

Q. I will hand you what is marked for the purpose of identification Government's Exhibit Three, and ask you if those were your granary and your chicken house? A. Yes.

83 Q. That is the way they were at the time the government brought this lawsuit? A. Yes.

Q. You haven't moved the granary, have you? A. No.

Q. It wasn't up high enough so you had to move it, was it? Isn't that right? A. That is right.

Q. But did you move the other buildings? A. No, I didn't move none of them.

Q. But you had them moved? A. No, I didn't move none of these two buildings.

Q. But these are the buildings that are out there on your place? A. Yes.

Mr. Camp: We move the admission of Government's Exhibit Number Three.

Mr. Meacham: No objection.

Mr. Whiteside: That exhibit will be admitted.

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Q. I will show you what has been marked for identification as Government's Exhibit Four, pictures of a windmill and a privy, and a cave? A. Yes.

Q. Those are the ones that were out there at that time? A. Yes.

Mr. Camp: We move the admission of Government's Exhibit Number Four.

Mr. Meacham: No objection.

Mr. Whiteside: They will be admitted.

* * * * *

84 Q. Mr. Merz, what changes have you made on this property since you bought it? A. Didn't make any.

Q. But you bought it in August of 1947 for $16,500.00, is that correct?

Mr. Meacham: We object to the cost of this property to him in 1947, which is nine (9) years prior to the date of the valuation we are trying to determine, and it is too remote to be of any assistance in determining its fair market value on March 8, 1956.

Mr. Camp: We would offer it for the purpose to show the value, but consider that the time element is a matter which the Commission can take into consideration as determining the probative value of this information.

Mr. Whiteside: The objection will be sustained.

Mr. Cress: I would like to observe to the Commission that I don't think it is binding at all, but it is just like the valuation of an Assessor; for instance, on taxes. It is not decisive or anything, but it is a circumstance that the Commission might want to consider. I think as far as fixing values of the land at this time it would be too remote, but it might be useful to you. Actually, it is of no great importance, but I think it might be of some value to you.

Mr. Whiteside: Go on.

Q. How many acres of your land is in that draw that doesn't grow things very well, Mr. Merz? A. About four (4) acres.

Q. About four (4) acres? A. Yes.

85 Q. What on your land is it that you can't farm as you have been farming for a number of years? A. Well, I have been farming it all the time.

Q. You can still farm it, can't you? A. Yes.

Q. It hasn't changed whether you can farm it or not, has it? A. No.

Q. That is all.

Questions by Mr. Gillespie:

Q. Mr. Merz, did you move the windmill? A. Yes.

Q. You moved it from its original foundation? A. Yes.

Q. Where did you move it to? A. I took it down.

Q. You haven't reconstructed it on the farm? A. No.

Q. Now, I believe you testified directly here that you had a well at your original location? A. Yes.

Q. Do you have a well at the new location? A. Yes.

Q. Did you have to dig that after you moved your improvements? A. Yes.

Q. Did you have to dig that after you moved your improvements? A. Yes.

Q. Is it as good a well as you had before? A. Yes.

Q. What was the cost of the well that you dug at the new location? A. I believe it was $500.00 and some odd dollars. I don't know exactly what it was, but around $500.00.

86 Q. There was no well at this location you moved to? A. No.

Q. But you had a good well where you had been? A. Yes.

Q. That is all.

Further Cross Examination by Mr. Camp:

Q. Did that include buying a new electric pump for this new well? A. No.

Q. You moved your old electric pump? A. Yes.

Q. And it cost then just to drill the well alone $500.00? A. Around $500.00.

Q. How deep did you go? A. 65 foot deep.

Q. That is all.

Mr. Camp: Mr. Meacham, I think that we stipulated at our pre-trial conferences that the highest and best use for all of the tracts were general agricultural purposes, except for Tract 142.

Mr. Meacham: A part of 142, that is correct.

Mr. Camp: We would like that stipulation on all of the tracts.

* * * * *

LOUIS MERZ, of lawful age, called as a witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

87 Direct Examination by Mr. Meacham:

Q. State your name? A. Louis Merz.

Q. Are you related to this character who testified before you, Leo Merz? A. My brother.

Q. Are you owner with him of a tract about which he testified? A. Yes.

Q. Did you hear his testimony? A. Yes.

Q. Do you agree with everything he said? A. Yes.

Q. That is all.

Cross Examination by Mr. Camp:

Q. The questions I asked him too? A. Yes.

Q. That is all.

Redirect Examination by Mr. Meacham:

Q. What about the cost of this well? Do you agree with that $500.00 business? A. Yes, sir.

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W. E. GUTHRIE, of lawful age, called as a witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination by Mr. Meacham:

Mr. Meacham: This is Tract A-106E. If the Court please, A-104E, A-106E and A-107E are at the north
88 end of the Base. The Merz land is right at the end of the runway as you will see from this plan view. This is the Merz, this is the Guthrie, this is the Kerkoff.

Q. State your name? A. W. E. Guthrie.

Q. Where do you live, Elmo? A. Two north and a mile-and-three-quarters west of Burns Flat. I live due north of the end of the runway, approximately a mile.

Q. How long have you lived there? A. Seventeen (17) years.

Q. How long have you lived in that area, Elmo? A. I am 44 years old. I have lived there all of that time with the exception of five (5) years when I was teaching school in Jackson County.

Q. Tract A-106E, which is 83.70 acres out of Lot 2, Lot 3, Southeast of the Northwest Quarter, and the Southwest of the Northeast Quarter of Section Three, Township

Ten, North of Range Nineteen. Do you own that tract? A. I do.

Q. How much land do you own out of which this tract comes? A. 160 acres.

Q. You own 160 acres there. Do you live there? A. Yes.

Q. In the years that you have spent in that area, and as owner of real estate in that area, do you think you know the fair cash market value of real estate in that area? A. I believe I do.

Q. Did you know the fair cash market value of this 160 acres owned by you on March 8th, 1956? A. I did.

Q. What was the fair cash market value of the 160 acres on March 8th, 1956?

89 Mr. Camp: We would object to him expressing an opinion on the basis that he is not qualified as an expert to express an opinion. There has been nothing shown here that he has the necessary qualifications to express an opinion as to the value of this land.

Mr. Whiteside: Could you qualify him a little bit better as to what his experience has been.

Mr. Meacham: If the Court please, the Supreme Court of Oklahoma, and the Federal Courts have definitely held that the owner can definitely testify as to the value of his property.

Q. In the 39 years you have lived in that area, you have owned real estate 17 years, is that correct? A. Yes.

Q. Are you familiar with the sales of real estate in that particular portion of Washita County, Oklahoma? A. Yes, sir.

Q. Have you been familiar with those sales and know what price property brings at sales? A. Well, I have observed them since I was 10 or 11 years old. When a boy is at that age he begins to know when land is transacted, and I knew about those sales all the time. My father owned land south of the Base and he sold that land when I was in the 5th grade, and I was aware of the value of that, and I grew up and I formed my own opinion as to the value of land, what was being transacted.

Q. When land was sold in that area out there, does word get around? A. Yes.

Q. Do they know what price it brings? A. Yes.

Q. So you feel now that you know the fair market value

of that land, and that you did on March 8th, 1956? A. I did.

90 Q. What was the fair market value of this 160 acres of land on March 8, 1956? A. $25,000.00.

Q. $25,000.00? A. Yes.

Q. Have you read the easement that the government imposed upon your property on March 8, 1956? A. I have.

Q. It covers 83.70 acres, and it has been agreed that the height is 71 feet on your south line to 160 feet on your north line. Do you think the taking of that easement on your property decreased it fair cash market value? A. I do.

Q. Do you think the fair cash market value of that property immediately after this easement was imposed on the property was less than the $25,000.00 fair cash market value it had before the easement was imposed on it? A. I do.

Q. How much do you think it decreased the fair cash market value? A. At least one-half.

Q. At least $12,500.00? A. Yes.

Q. What is your basis for saying it has decreased your fair cash market value $12,000.00, at least that much? A. After this easement was imposed in the spring of 1957—this was imposed in 1956, I know that two tracts not too far away, the Babb land and the Wood land was sold with an easement like this upon it, and it reduced that more than one-half of the value of the land.

Q. How far away are these particular tracts, the Babb land and the Wood land? A. Well, I am two north of Burns Flat, and the Babb land is only one south—so that would be three miles from my north point to the Babb land, and the Wood land lies at the north end of the Babb land.

91 Q. From your years of experience what type of people buy real estate in that area? A. Farmers.

Q. Do you know of anyone that bought any property out there that wasn't actually a farmer? A. I know of one piece of land that was sold, that he bought it for rental purposes.

Q. The rest of the sales have all been to farmers? A. Yes.

Q. Do you know what affect the existence of an ease-

ment on it, in your opinion would the existence of an easement from the Federal Court in the abstract on a piece of land bother a farmer who is getting ready to buy the land? A. Well, farmers, speaking from my standpoint and classing myself as a farmer, do not like to purchase land with any kind of an easement upon it, such as R.E.A. or any kind of government easements. Because it adds to that abstract and every time that abstract is brought down later on somebody pays for the abstracting. If you leave it in your own family, when it is brought down, it increases the cost of abstracting each time.

Q. This 160 acres that you own, how much of it is in cultivation? A. Approximately 110 acres.

Q. Is your land all flat like the Merz land, or what type of land is it? A. I would call my land slightly rolling, because it has terraces. Some of the place lays pretty flat, but it is slightly rolling.

Q. Do you know what part of your land, this 83.70 acres, this easement covers? Do you know the portion of your land that is covered by this easement on the ground? A. I do.

Q. Does that cover your cultivated land, or your pasture land? A. That covers the cultivated land, with the exception there is a lane that comes down there, and
92 a little piece of pasture around it, a lot around the house, holding lot for my cattle.

Q. What crops do you have out there? A. Cotton and feed; of course, I am in the dairy business, I utilize some of it for feed for the cows, but mostly cotton and feed.

Q. That is all.

Cross Examination by Mr. Camp:

Q. Mr. Guthrie, the tract of land that you refer to, that you are talking about that sold with the clearance easement on them, what shape were they? A. The land, it was a strip of land. I don't know exactly the width, it runs north and south across each quarter or eighty, and the first was across the eighty for so many rods high, and the other was across the entire eighty so many rods high.

Q. Wasn't it only two or three hundred feet wide, and about a mile long? A. I couldn't tell you how wide it is,

unless I take a pencil and figure it out. About 30 acres in the first tract, and 14 acres in the second tract.

Q. And it was about a mile long? A. The first tract that included the 30 acres, it was a half-of-a-mile long, it took a quarter section of land, and the other took an eighty.

Q. The sale from Mr. Babb was to Henry Walters? A. Yes.

Q. It was 455 feet wide and a half-of-a-mile long, is that correct? A. As far as I know. I know it was a half-of-a-mile long, I don't know the exact width, and it includes approximately 30 acres.

93 Q. Let me ask you this, you are a farmer. Would a strip of land only 400 and some feet wide be as valuable to you in that shape as an ordinary shaped piece of land? A. Well, hardly as much. That is why I said I wasn't damaged as much, because this land was damaged more than half the value of the land.

Q. Are you attributing the value to the clearance easement or to the shape of the land? A. Well, I feel the clearance easement had its part.

Q. But in fact the fee, the ownership of the land, had been taken and there was only just a little strip of land left, wasn't there? A. That is right.

Q. Do you know what height of limitations the clearance easement were over those two little strips of land? A. I know what they are when land is close, so I presume they are rather low.

Q. They would be right near the ground where yours is 71 feet on the south? A. The north end is 100 and some feet. It begins at 70.

Q. From 71 feet to 173 feet, is that correct? A. Yes.

Q. Approximately? A. That is right.

Q. That is on the highest part of your land, your land slopes downhill, it is more than that down in the valley, is that right? A. Probably that is right.

Q. Were you farming that land before the government put the easement on it? A. That is right.

Q. And you are still able to farm it, aren't you? A. Yes, sir.

Q. Just as well as you could before? A. That is right, as far as the easement is concerned.

Q. That is all.

94 Redirect Examination by Mr. Meacham:

Q. Mr. Walters has purchased this one strip of land, is that right? A. Yes.

Q. Did he own the property next to it? A. Yes, he owned an eighty—the eighty would be a half-of-a-mile down the road and laid in there.

Q. He owned other land right in that section? A. Yes.

Q. That is all.

Recross Examination by Mr. Camp:

Q. Was this $25,000.00 figure which you put on the fee, for the total value of your land? A. That included all of it.

Q. That included all of your oil and gas rights, didn't it? That is what you thought the land was worth? A. Yes, the total of it.

Q. If there were a lease on it, of course you wouldn't be entitled to the total value of that land? You would only be entitled to what the lessor's interest that remained would be before the easement was taken? A. That is the way it was figured out. I never could understand it that way, that is the way it was figured out.

Q. Does that land have a mortgage on it? A. Yes, sir.

Q. And how many dollars is the mortgage? A. I have it tied with another farm now, I couldn't exactly say the amount at the time of the taking. It had some $2,900.00 mortgage on it.

95 Q. It now has $16,000.00 mortgage on it? A. On it, and the place across the road from it.

Q. Across the road? A. Yes.

Q. Where is this other tract across the road, it is to the east? A. Well, it is the southwest quarter of the section, just across the road. My place lays in the middle of the section, and then an eighty belongs to another fellow on the extreme west, and an eighty on the east, and I have two eighties in the middle. I have an eighty in the corner, southwest corner. Mine is 3-10-19.

Q. Isn't that the Merz land? A. No, north of me and it is the southwest quarter of the section north.

Q. When was it that you placed the $16,000.00 mortgage on this land and the eighty adjoining it? A. 1958, I guess.

I believe that is right. This will be the first crop off of it, it would be 1957.

Q. As I recall the eighty that you are speaking of in Section 34, does it run north and south? A. That is the 160; southwest quarter is 160.

Q. That is in the red breaks over there? It is not farm land like 106E is, is it? A. The farming area is terraced, slightly rolling. Of course, the pasture land is in the breaks.

Q. And there is more pasture over there? A. 70 acres of pasture, about 90 acres in cultivation, it would be more or less.

Q. It is not as valuable of land in your estimation as your home place, is it? A. No. Another reason for that is the difference in improvements. If you look at the two farms you would find quite a bit of difference in the improvements on the farms.

96 Q. Your farm still has a $16,000.00 loan value at this time? A. Those two do together.

Q. That is all.

Questions by Mr. Whiteside:

Q. I understood you to say that in your opinion your farm has been decreased in value at least $12,500.00. Is that what your statement was? A. Yes.

Q. This easement just covers a little over half of your quarter, doesn't it? A. Yes, sir.

Q. You place a valuation of $25,000.00 on it, that is on the entire quarter section? A. Yes.

Q. Is it your position that the 50 percent reduction in value is 50 percent to the entire quarter, or 50 percent to this 83.70 acres? A. Where the easement lays it is farming land, and the other like I spoke, the place across the road, it is rough pasture ground. When it rains the land is valuable, therefore where the easement is over is all practically over the value of the land. In other words, where this easement takes over this cultivated land, most of that land would be worth better than $20,000.00 of the full value of the place, if you were taking the value of the land.

Q. That eighty? A. That is right, if you take it, it is the valuable part of the land. The other is pasture and rolling land.

Questions by Mr. Tisdal:

Q. The part with the improvements on? A. Yes.

Q. It covers practically all of the cultivated land? A. It covers 83.70. That covers practically 87 acres in
97 cultivation, and the easement comes out and catches a little over the quarter of a mile.

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JOHN KERKOFF, of lawful age, called as a witness on behalf of the Landowners, after being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination by Mr. Meacham:

Mr. Meacham: This is Tract No. A-107E, the Kerkoff land.

Q. State your name? A. John Kerkoff.

Q. Have you been sworn, Mr. Kerkoff? A. Yes, sir.

Q. Where do you live? A. I live a mile-and-three-quarters south and two north of Burns Flat.

Q. How long have you lived there, Mr. Kerkoff? A. 58 years.

Q. 58 years? A. Yes, sir.

Q. How long have you owned this particular tract of land? A. About 19 or 20 years.

Q. This tract is 80.10 acres in Lot Four, and the Southwest of the Northwest of Three; and Lot One, and the Southeast of the Northeast of Four, in Township 10, North of Range 19. Do you own that land? A. Yes, sir.

Q. And how many acres do you own there altogether? A. 20[illegible] acres.

98 Q. Mr. Kerkoff, you own some on the east side of the road and some on the west side, is that correct? A. Yes, own an 80 on the east, and 120 on the west.

Q. Making a total of 200 acres? A. Yes.

Q. You said you had owned this land since 1919, is that correct? A. No, 1939 or 1940.

Q. 1939 or 1940? A. Yes, but I lived on it all of my life, since I was eight (8) years old.

Q. You have lived on that land for 58 years? A. Yes.

Q. During the time you have lived on this land, during the time you have owned this land, have you been interested in and watched the sales in that particular area? A. I sure have.

Q. Do you think you know what sales have been made in that area? A. I do.

Q. Do you think you know the fair cash—do you think on those sales down there, do you know how much the property brought on those sales? A. I do.

Q. In that 58 years do you think you have accumulated enough knowledge to know the fair cash market value of real estate in that area? A. I do.

Q. Do you think you knew the fair cash market value of real estate in that area on March 8, 1956? A. Yes.

Q. In your opinion what was the fair cash market value of your 200 acres on March 8, 1956? A. About $125.00 an acre straight through, or about $25,000.00.

Q. About $125.00 an acre, or about $25,000.00 for the whole 200 acres? A. Yes.

99 Q. Are you familiar with the easement that the government has imposed on it? A. I think so.

Q. Have you read it? A. Yes, sir.

Q. And we have stipulated and agreed yours runs from 69 feet on the south line to 164 feet on the north line. Do you think the imposition by the government of this easement on your 80.10 acres of the 200 acres decreased the fair cash market value of the whole 200 acres? A. I do.

Q. How much do you think it decreased it? A. About fifty (50) percent.

Q. In other words you think your damage was about $12,500.? A. Yes.

Q. What type of land do you have out there? A. I have sandy soil, and mixed sandy soil.

Q. On the 80, is it rolling or flat? A. Slightly rolling, it is rolling. It is terraced.

Q. How much is in cultivation on the 80? A. About 55 acres.

Q. Is that 55 acres underneath this easement? A. Yes, all except about 64 feet, I believe; or 164 feet, something like that, on the southwest corner, but then it runs across the road and that is about 164 or 165 feet on the north side, on the 120 across the road.

Q. In other words this easement takes a part of the 80, and then it reaches over and takes a part of the 120 over across the road? A. Yes.

Q. Is that part it takes across the road under cultivation? A. Yes.

100 Q. This 80.10 acres covered by the easement covers about 55 acres in cultivation, is that correct? A. Yes.

Q. John, you bought this in 1939? A. I believe that is right.

Q. Who did you buy it from? A. Bought it through the Court from the heirs.

Q. From the heirs of whom? A. The heirs of the place; I didn't buy it from the heirs, I bought it through the Court.

Q. Who was the fellow that passed away and left the heirs? A. My father.

Q. Since 1939 have you been in possession of this property? A. Yes.

Q. Have any of your kin folks or anyone else ever given you any trouble about possession, or that you owned it, or anything else? A. No.

Mr. Meacham: If the Court please, the United States Attorney's Office isn't in position to guarantee title. Mr. Kerkoff was Administrator, but he made an Administrator's Deed to himself which slightly clouded his title. But he has been in possession for more than 15 years.

Q. That is all.

Cross Examination by Mr. Camp:

Q. Part of this easement Mr. Kerkoff, is in the road that runs between your farms? A. I pay taxes on that.

Q. You don't farm it, do you? A. No, I pay taxes on it.

101 Q. Does it interfere with that part of your land? A. No, I wouldn't think so.

Q. Are you still farming the land? A. I haven't this last year. I hadn't farmed it last year or this year. Part of it is in the Acreage Reserve, and last year I had cotton reserve, Soil Bank, and Acreage Reserve.

Q. There wasn't anything in that 69 feet above the ground out there, up to 164 feet above the ground that

kept you from farming your land just as you always had farmed it? A. No.

Redirect Examination by Mr. Meacham:

Q. Mr. Kerkhoff, did you have an Oil and Gas Lease on your place on March 8, 1956? A. I did.

Q. Is it still on there? A. No, they dropped it. They got their part of the money and they dropped it.

Q. It expired by its terms? A. No, as soon as the easement went on they just dropped it, and I have tried to lease it since and they turned it down, and said they will not take a lease on it with that easement.

Mr. Camp: We object to any statement as to what he has tried to do, and what he has succeeded in doing as being incompetent, irrelevant and immaterial.

Mr. Whiteside: Sustained.

Q. That is all.

Recross Examination by Mr. Camp:

Q. This value that you attributed this $25,000.00 to your full 200 acres, that was for all the value, all of the minerals, wasn't it? A. No. You take the land right around it, they have been selling and keeping half of the minerals.

102 Q. That is what the value is to your land? A. Yes, with half of the minerals on it.

Q. That is how you considered this? A. That would be the damage. I didn't figure the minerals because they keep the minerals on the other 120 acres, but they ruined the minerals on the 80.

Q. You had a lease in existence. Part of the damage wasn't to you, part of the damage was to the ones that held the lease? A. Yes, they got their money out of it.

Q. That is all.

Questions by Mr. Gillespie:

Q. This 200 acres has been operated as a unit? A. Yes.

Q. You consider that as a unit farm, the 200 acres? A. Yes, and the house is on it where they take the easement.

Q. You have always regarded it as a unit? A. Yes.

Q. That is all.

Questions by Mr. Whiteside:

Q. Do you own all of the minerals lying under this 80 acres? A. Yes, sir; I do.

* * * * *

ROBERT DAVIS, of lawful age, called as a witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

103 Direct Examination by Mr. Meacham:

Mr. Meacham: This is A-118E. Landowners' Exhibit "A", the part marked in red is the second Declaration of Taking. The portion in the original blue map is A-118E, the first Declaration of Taking.

Mr. Gillespie: It is three separate tracts?

Mr. Meacham: It is the same tract, and it can cause confusion, and to help the confusion this fee taking was after the clearance easement was imposed upon it.

Mr. Whiteside: Is the easement on A-118E?

Mr. Camp: Yes, the same type of easement, but not the same heights.

Q. State your name? A. Robert Davis.

Q. Have you been sworn? A. Yes, sir.

Q. Where do you live, Mr. Davis? A. A mile-and-three-quarters south of Burns Flat.

Q. How long have you lived there? A. Since 1944.

Q. How long have you lived out in that area, Mr. Davis? A. Since 1944.

Q. Tract A-118E is 50.25 acres in the northwest of the northwest, and the north half of the southwest of the northwest of 27-10-19? A. Yes, sir.

Q. Do you own that tract? A. Yes, sir.

Q. How much land do you own there? A. 60 acres.

Q. Were you living there on March 8, 1956? A. No, sir.

104 Q. Where did you live? A. A mile-and-a-quarter —I mean a mile-and-three-quarters south of Burns Flat.

Q. How much land did you own where you lived? A. 80 acres.

Q. How far away is this 60 acres from the 80 acres that you owned where you lived? A. Two miles.

Q. On March 8, 1956 you owned the 60 acres out of which this 50.25 acres is carved, and you owned 80 acres where? A. Two miles away.

Q. Did you own any other land? A. It is two-miles-and-a-quarter to the back side of it, really two miles to one side of it.

Q. Did you own any other land on March 8, 1956 in this immediate area? A. No, sir.

Q. Did you farm any other land? A. Yes, sir; I rented a place a mile north of Burns Flat.

Q. And how far was it from the place, your home place? A. Two-and-three-quarter miles.

Q. Then on March 8, 1956 you owned an 80, this 60, and 160 that you had leased? A. That is right.

Q. Did you operate all of that land as one unit? Did you use the same implements and that sort of thing? A. Yes.

Q. In the time that you have lived out there in that area, owning real estate and living out there, have you kept up with the sales of real estate made in that area? A. Yes, sir.

105 Q. And with what land was sold and how much it brought? A. Yes, sir.

Q. You have done that during the time at least since 1944? A. Yes.

Q. Do you think with that experience and that knowledge that you know the fair cash market value of real estate in that area? A. Yes.

Q. Do you think you know the fair cash market value of this 60 acres on March 8, 1956? A. Yes.

Q. What was that fair cash market value at that time? A. At least $300.00 an acre.

Q. That would be $18,000.00 for the 60 acres? A. Yes.

Q. Are you familiar with this easement? Have you read it? A. Yes, sir.

Q. And on March 8, 1956 an easement was placed there on which runs approximately 32 feet on the north line to 85 feet on the south line. Do you think the imposition of that easement decreased the fair cash market value of your property? A. Yes.

Q. How much? A. About half of that.

Q. Why? A. According to the adjoining sales that sold there with the easement on it. The land just across the road from the north, Johnson bought the Wood land, and the Walters sale, too, were close by, that land brought $100.00 an acre, those two.

Q. Were the Wood and Babb land—it brought $100.00 an acre with the easement on it, is that correct? A. Yes, a portion of it had an easement on it.

106 Q. Do you think that land was as good or better than your land? A. No, my land is a little bit flatter than theirs, it is similar to it.

Q. How much do you think the value of their land was? In other words how much do you think the $100.00 represented or a decrease in the fair cash market value? A. A half or more.

Q. After the Government took this first easement on 50.25 acres of the 60 on March 4, 1957, that is on the second page here, there was another taking, is that correct? A. Yes, sir.

Q. In connection with Tract 142, which is 15.49 acres of the 60 acres, that is in the Northeast corner of your 60 acres, is that correct? A. Yes, sir.

Q. Are you familiar with what land they took? Do you know where it is on the ground? A. Yes, sir.

Q. On March 4, 1957 was there a portion of that 15.49 acres that was not being used for farming purposes? A. Yes.

Q. How much was used for what other purpose other than farming? A. 5½ acres there that had a sand pit on it.

Q. How long had that sand on it? How long had that sand pit been on that 5½ acres? A. It was on there when I bought it in 1954, October 1954.

Q. Did you sell sand from that sand pit? A. Yes, sir.

Q. Did you sell sand? Do you have a record there of the sales that you made? A. Yes.

107 Q. How much did you sell in 1955? A. $125.00 worth.

Q. How much did you sell in 1956? A. $95.75 worth.

Q. In all of 1956? A. I have March of 1956, that is up to March of 1956.

Q. Just tell these gentlemen here—

Mr. Camp: We object to all of this line of questions and answers on the sale of this sand as being incompetent, irrelevant and immaterial.

Mr. Whiteside: I think it is proper.

Q. Tell them briefly what you sold? A. I sold $3,089.65 worth from March 1956 to March 1957, that is to Kiewitt; and I sold $305.00 to L. M. Jones; and $35.00 worth to the Cordell Schools, and $60.00 worth to Simpson, and sand for blacktop to the County Commissioners for $42.00. I sold $3,762.35 of sand.

Mr. Cress: May we have a general *objction* to this line of testimony?

Mr. Whiteside: Yes. It will be overruled.

Q. How much was the total sand you sold up to March 4, 1957? A. The total sand that I sold was $3,762.35.

Q. Let's get a break-down again. In 1955 how much did you sell? A. $125.00 worth.

Q. From January 1, 1956 to March 1956, how much did you sell? A. $95.75 worth.

Q. From March 1956 to March 1957 how much did you sell? A. $3,089.65. I have this other that went outside, $147.00 worth besides that.

108 Q. In addition to that? A. Yes.

Q. Do you know how much sand was out there in this 5½ acres? A. Yes.

Q. How do you know? A. Nolan Brothers sent an engineer down there and we cored it.

Q. Were you there when they cored it? A. Yes.

Q. What do you mean by cored? A. They had an auger and we tested the sand, how deep.

Q. Did you test this 5½ acres, this 5½ acre area? A. Yes.

Q. How deep was this sand? A. 23 feet to the deepest to 13 feet in the shallow places.

Q. Was it sort of a sand dune? A. Yes, it was just a big sand dune up there.

Q. 23 feet in the middle and 13 feet on each side? A. Yes.

Q. Would it be fair to say the average *dephth* of the sand would be 18 feet, about half of the 23 and about half of the 13, is that right? A. Yes.

Q. How much did you sell this sand for, Bud? A. Averaged out about 8¢ a yard.

Q. When was it this measurement was taken? A. In November of 1954.

Q. That was before any of this sand was sold? A. Yes.

Q. Have you figured about how many cubic yards 5½ acres 18 feet deep would be? A. Yes, sir.

109 Q. How many cubic yards do you figure that was? A. 239,580.00 cubic feet.

Q. Cubic feet? A. Yes.

Q. And how many cubic feet in a cubic yard? A. 27.

Q. Alright, have you got it in terms of cubic yards there? A. Yes.

Q. How many cubic yards? A. To start out with 159,720.00 cubic yards.

Q. Have you computed how many cubic yards you sold off of that sand pit after that time? A. Yes, 47,250.00.

Q. That leaves on March 4, 1957 there was still 112,000.00 cubic yards, is that correct? A. Yes, sir.

Q. How much exactly? A. What do you say?

Q. How many cubic yards exactly was there when the Government took this property in fee on March 4, 1957? A. 159,720.00

Q. Is that deducting the cubic yards you had sold out of there? A. I see what you mean. 112,000.00 cubic yards.

Q. At 8¢ a cubic yard would be how much? A. $8,997.60.

Q. Do you from your computations of the amount of cubic yards, and from your dealings in the sale of that sand, do you think you know the fair cash market value of that 5½ acres on March 4, 1957? A. Yes, sir.

Q. How much? A. At least $8,000.00.

110 Mr. Cress: I presume we have had an objection to this line of testimony, and in order to preserve the testimony we move to strike the testimony as not proper measure of damage.

Mr. Whiteside: Overruled.

Mr. Cress: Exception.

Mr. Whiteside: The objection to the testimony concerning the sand pit will be admitted simply as an element in determining the value of this land, and not as a sand pit per se.

Q. Bud, the fee taking was 15½ acres, approximately? A. Yes.

Q. Do you think you know the fair cash market value of that 15½ acres less the sand pit, that would make it about 10 acres on March 4, 1957? A. Yes.

Q. What was the fair cash market value of the remainder of that 15½ acres on March 4, 1957? *Aq* That house and the 10 acres I valued at $3,000.00. I had a hand that worked for me and lived in that house, and after they took it away from me I didn't have no home for him. He had a cow, garden and everything.

Q. For the 10 acres $300.00 an acre, is that right? A. Yes.

Q. Had there been any appreciable difference between the fair cash market value of your land, and land in that area, between March 8, 1956 to March 4, 1957? A. No, sir.

Q. We have A-142 which is the 15½ acres consisting of the sand pit, and 10 acres in addition. Now, with regard to Tract A-142E. It covers 43.63 acres which is all of the remainder of the 60 acres except for the little nick in the corner, is that correct? A. Yes, sir.

111 Q. Now, when you said a minute ago that the value of it, when you testified about the value of the 15½ acres, were you taking the total value without regard to whatever the Commission would decide you were entitled under the original taking, is that correct? A. I don't understand you, Denver.

Q. You testified a minute ago that under A-118E, the first easement that was made in March of 1956, that you were damaged a certain amount? A. Yes.

Q. Now, these values you are testifying to as of March 4, 1957 is the total amount of your damage? A. Yes.

Q. Whatever the Court would allow you under the first taking would be subtracted from these values, is that correct? A. Yes.

Q. This A-142E covers all the remainder of the 60 acres, is that correct? A. Yes.

Q. And the heights are 17 feet on the north side to 42 feet on the south side. What was the fair cash market value of this 43.63 acres on March 4, 1957? A. At least $300.00 an acre.

Q. Do you think the imposition of this easement from 17 feet on the north side to 42 feet on the south side decreased the fair cash market value of this 43 acres? A. Yes.

Q. How much? A. At least two-thirds.

Q. At least $200.00 an acre? A. Yes.

Q. Why? A. Well, they dropped my gas lease and the adjoining sales with this easement on it.

Q. Your gas lease, what do you mean by that? A. They dropped my lease on the farm.

112 Q. You mean oil and gas lease? A. Yes.

Q. And any adjoining sales, to what sales do you refer to there? A. Babb sale and Henry Walter sale. And what other places?

Q. Yes. A. Well, the place sold just directly across from me, and a place sold a quarter of a mile east of it.

Q. Bud, this 60 acres out there, what sort of road ran north of this 60 acres prior to March 8, 1956? A. Blacktop road.

Q. Hard surfaced road, is that correct? A. Yes.

Q. That is the north side of your 60 acres? A. Yes.

Q. What improvements did you have there on that place? A. House and barn, chicken house.

Q. Did you move those improvements off, or what happened to them? A. No, sir, they took my house, and the other improvements are still there.

Q. Did they pay you for the house? A. I got a sum of money for all they took from me, I suppose they did.

Q. How much did you get? A. I don't know, they didn't tell me.

Q. You mean you got it in this lawsuit? You weren't paid anything other than what is in this lawsuit? A. No.

Mr. Camp: We object to any testimony along the line of what the estimated judgment was.

Q. You weren't paid anything except the deposit that was made initially in this litigation we have here? A. No, sir.

113 Q. Did you say you had an oil and gas lease on this on March 8, 1956? A. Yes, sir.

Q. Do you have one now? A. No, sir.

Q. Was that lease dropped? A. Yes, sir.

Q. Had it expired by its terms, or did they just drop it? A. Just dropped it.

Q. Have you been able to lease it again? A. No, sir.

Q. Describe your land to the Court, how much of it was in cultivation? A. How much was in cultivation to start out with?

Q. On March 8, 1956? A. 50 acres.

Q. How much was in cultivation on March 4, 1957? A. 40 acres.

Q. What sort of land is yours? Is it real hilly, or canyons, flat or what sort of land is it? A. All of it except five acres is very flat.

Q. That is all.

Questions by Mr. Gillespie:

Q. On this A-142, the taking in fee which is 15.49 acres, do I understand from this witness that he values that at $11,000.00, the tract as a whole.

The Witness: That is right.

Cross Examination by Mr. Camp:

Q. Mr. Davis, I will hand you what has been marked for identification as Government's Exhibit Five, and ask you if that is a fair reproduction of the buildings
114 that were on the tract 118E, and later on Tract 142? A. They are not all on there. This is the house.

Q. Are these buildings fair reproductions of those buildings that were on there on those dates? A. Those two buildings were.

Q. They are? A. Yes, sir.

Offer in Evidence

Mr. Camp: We move the introduction of Government's Exhibit Five.

Mr. Meacham: No objection.

Mr. Whiteside: They will be admitted.

* * * * *

Q. Now then, sir, I believe you testified there wasn't any appreciable change in the value of the land from 1956 to 1957, from March 8, 1956 to March 4, 1957 in that area, is that right? A. That is right.

Q. It is also my recollection that you valued the 60 acres before the Government brought this lawsuit, that is before March 8, 1956 at $300.00 an acre, or $18,000.00 for the total value of that property, is that correct? A. That is on that first suit?

Q. No, sir, on the land. On your 60 acres? A. No, I

testified that sand pit was worth $8,000.00.

Q. No, sir, we are not to the sand pit. On 118E, I wrote it down here, and it is my recollection that you said that the value of your land, that 60 acres before this easement was imposed upon it was $300.00 an acre or $18,000.00? A. Yes.

Q. That is correct, is it not? A. Yes.

Q. Then I believe you testified that it was reduced to approximately one-half in value as to the portion that was within the easement area? A. Yes.

115 Q. Or was that for your full 60 acres? A. No, sir.

Q. It was just 50 acres? A. Yes.

Q. That would be almost $9,000.00? It would be $9,000.00 reduction if it were for the full 60 acres, wouldn't it? A. Yes.

Q. Half of $18,000.00 would be $9,000.00? A. Yes.

Q. I want to get my facts straight here. You said that on 142, that is the fee taking, that you placed a total value on that of $8,000.00 for the sand area, and $3,000.00 for the remaining 9½ acres, for a total of $11,000.00. Is that correct? A. Yes, sir.

Q. And that on 142E, you valued that at $300.00 per acre before the easement of 142E was imposed upon it, and it was worth only one-third after the easement of 142E was imposed upon it, is that correct? A. Yes.

Q. Now then, sir, can you tell this Court how that your land which was worth by your testimony $18,000.00 at the beginning, and which you have testified did not change in value appreciable, was damaged according to my calculations $28,600.00 approximately? I would like you to explain that to the Commission. A. You want me to explain?

Q. Yes, explain that to the Commission.

Mr. Meacham: I think George made a mistake in arithmetic or something. It is $19,206.00.

Mr. Camp: $11,000.00 to fee taking, and $200.00 times the last easement was $8,600.00, and approximately $9,000.00 on the original adds up to $18,600.00.

Mr. Meacham: He testified whatever he was entitled under the first one would be deducted from the second one, so it makes a total of $19,276.00.

116 Q. How are you going to explain you were dam-

aged more than your property was worth? A. The sand pit, you told me not to take the sand pit into consideration under the first consideration.

Q. What your land is worth is all you are ever entitled to, not more than it is worth. A. You said it didn't have anything to do with the second taking, and that was on the second taking.

Q. I haven't told you anything. I am asking you, you are the witness. A. You asked me on this first taking how much I was damaged.

Q. No, we asked you the value of your land before the Government ever moved in down there, and you said $18,000.00. A. I wasn't putting the sand pit in that first taking.

Q. You owned it, didn't you? A. Yes, sir.

Q. Now, you are wanting to change your values, are you? A. No, sir, I am not.

Q. Then was it still worth $18,000.00? A. Not without the sand pit in it.

Q. That was March 8, 1956. You testified it was worth $18,000.00. As a matter of fact you had just recently purchased this land for only $5,000.00, hadn't you?

Mr. Meacham: We object to that for the same reason we objected to it before, and we object to the question itself containing the evidence what is prejudicial which is the same thing that happened before.

Mr. Whiteside: He can make a showing when he purchased it.

Q. In October of 1954? A. Yes.

117 Q. At the time you purchased this land for $5,000.00, didn't you?

Mr. Meacham: We object to that for the reason that it is too remote to be helpful to the Court in determining the value on either March 8, 1956 or March 4, 1957.

Mr. Camp: We will point out to the Commission this is less than two years before the time that is under consideration.

Mr. Whiteside: Overruled. I believe that is recent enough and it should be admitted as an element.

Mr. Meacham: Exception.

Mr. Camp: All of these are elements, the circumstances under which the Commission may consider the case.

Q. Now then, Mr. Davis, the date of the purchase of the land by you was in October of 1954 for $5,000.00? A. Yes.

Q. Would you tell this Commission who moved the house that is here in the picture on Government's Exhibit No. 5? A. Who moved the house?

Q. Yes. A. I did.

Q. When? A. 1957. I bought that house from Kiewitt.

Q. As a matter of fact didn't you sell the house to Kiewitt before this action was brought? A. No, sir. The Government took the house away from me.

Q. The Government bought it from you, is that correct? A. No, sir; yes, the Government bought it from me.

118 Q. The Government bought it from you? A. Yes.

Q. Are you telling the Commission that you bought it from Kiewitt? A. Yes.

Q. Do you know how he came by it? A. Yes.

Q. How did he come by it? A. He was the contractor on government property, and he was going to destroy it, and I knew how these other buildings were going, and I bought it from him.

Q. You still have the house? A. No, sir; I tore it down, burned part of it.

Q. You destroyed it? A. I used the lumber out of it.

Q. When did you start the removal of the house? A. After the Government filed those condemnation papers on me.

Q. Would you look at this sir, and read it. A. I have a contract from Kiewitt, and when I bought this house and what I paid for it. This is it.

Q. Would you explain that; sir? I didn't understand what you meant? A. I bought this house and paid for it and started moving it. This is it.

Q. When did you start moving it? A. In a month's time from the time this happened.

Q. Now, that letter that you are looking at was written back at the time this action was brought, and I believe it states that you had started removing it sometime before that? Does that refresh your memory? A. No, sir, I never touched that house until they took the land away from me.

Q. That is 142? A. This last taking.

119 Q. Was it in 142? A. This house was in this 15½ acres they took away from me.

Q. Did you have this agreement with the contractor to buy this house before the Government brought the second suit? A. No, sir, I knew that they was going to come down there and go to work. I sold this Kiewitt all of this sand and I knew him, and I went there and asked him how I could get that house, and he told me.

Q. How? A. That he could write me up a contract, and I could buy the house.

Q. Was it true that the house was vacated on about the 15th day of December 1958? A. The house was vacated when the Government moved the man working for me to Sallisaw. He went to Sallisaw.

Q. As a matter of fact on the date this was taken you didn't have a hired man in this house? A. They moved the hand in this house to Sallisaw.

Q. He was just an employee of the Government? A. No, he was working for me.

Q. How did the Government move him to Sallisaw? A. The Government man, Huss, said this hired hand was entitled to damages wherever he went, and was—he was going to Sallisaw and they moved him to Sallisaw, paid his mileage. Then he come back the next year and worked for me, and has been working for me ever since.

Q. So the hired hand took the Government for the expense of moving him to Sallisaw? A. Yes.

Q. That was back before this action was ever brought? A. No, he knew this house was going to be moved.

Q. Let's go back to this letter. It states the house was vacated on about 15 December 1956. Didn't you

120 just say that was about correct? A. Yes, sir, he moved down there sometime before Christmas, I don't know exactly when.

Q. On the date of 142, that action was brought on the 4th day of March 1957, and there wasn't anybody living in this house? It was a vacant house sitting out there? A. Yes, because they moved him out of it.

Q. Just limit your answer to the question. It was vacant on December—on March 4, 1957? A. Yes.

Q. Was the house still sitting there on the land on

that date, or had it been moved by the contractor? A. No, I moved the house.

Q. Do you know whether the contractor ever bought this house from the Government? A. He was the contractor that built the runway that I have the contract with at home, and I can produce it as evidence.

Q. Have you read it? A. Yes.

Q. Did you read anything in there about him getting all the property the Government condemned? A. No, I tried to get the house from the Government, they wouldn't let me have it. I sold this sand to him, and I knew him personally. He said to clear his office and he would sell it, and he would make me a contract that he sold it.

Q. You don't know whether he owned it? A. No, I knew the Government bought it.

Q. You knew the Government owned it when we brought the action? A. Yes.

Q. How much did you pay for it? A. $5.00. He said he was going to destroy it, and he said I might as well have it as not.

121 Q. Now then, while you were out there core drilling, did you test some of those other sand deposits? A. On the other side?

Q. Yes, those that you have left. A. Yes, it is a different type of sand. It wouldn't pass the specifications up there.

Q. Who made those tests? A. Nolan Brothers Engineers.

Q. I believe the Commission might have the impression that you had a sand pit out there. You really didn't have a sand pit out there, did you? A. Yes.

Q. You had something to wash it, separate the sand from the mud as a sand pit operates? A. No, it is alright to use as it was up there on the runway, buildings and everything else.

Q. Actually it wasn't a sand pit where they wash it and sell sand? A. They didn't have to do that, it was already ready to sell.

Q. What did they do? Did they just come over there and hauled it off of that hill and took it off and used it for fill? A. Used it under those buildings and other places, they mixed it in with the runway materials up there, the gravel, rocks and everything else.

Q. Most of it you sold was to the Air Force there for the construction of the runway? A. Sir?

Q. Most of it that you sold was for the Air Force? A. I sold it to Kiewitt and Nolan. I never sold any of it to the Air Force.

Q. For the Base, the market was created there by the Base? A. Part of it was.

122 Q. What portion of it here wasn't? Didn't you sell less than $100.00, or about $200.00, less than that to anybody else? A. I sold $147.00 off of it that did not go to the Base.

Q. This $3,762.35, all of that except $147.00 went for the special market created there by the Base? A. It was sold on the Base.

Q. When was this lease for oil and gas entered into between you and Magnolia? A. It was on there when I bought the farm.

Q. Do you know when it was to expire by its terms? A. When?

Q. Yes. A. 1959.

Q. Wasn't it July 15, 1958, Mr. Davis? A. I don't know exactly, it was either 1958 or 1959.

Q. What portion of this approximately $9,000.00 which you say your land was reduced in value on 118E, did you attribute to the fact that the mineral value was decpreciated?

A. Yes.

Q. How much? A. At least one-third, that farming land.

Q. $3,000.00 on the 60 acres? A. Yes, sir.

Q. Is that the figure you are going to stay with? A. Yes.

Q. That is by 118E, the first taking? A. The first taking?

Q. Yes. A. Yes, sir.

Q. Minerals reduced $3,000.00? A. Yes, sir.

123 Q. Then on Tract 142, that is the fee taking, that is where they got the whole ownership. How much of that would you say was attributed to minerals? A. $3,000.00.

Q. That is oil and gas minerals. Your oil and gas lease, that is what we are talking about? A. Yes.

Q. Or is that all minerals? A. Oil and gas, all minerals.

Q. $3,000.00? A. Yes.

Q. Then by the taking that was imposed on your land on 142E, how many dollars were your minerals reduced there? A. $3,000.00.

Q. Therefore your total mineral reduction on your land was $9,000.00? A. Sir?

Q. You say it was reduced $3,000.00 by 118E, $3,000.00 by 142, and $3,000.00 on 142E. A. The same $3,000.00 applies to all three of them.

Q. Same $3,000.00 to all of them? A. Yes, sir.

Q. In other words just one $3,000.00 for the works? A. For the minerals, yes.

Q. And you say that it was reduced $3,000.00 the first time when they brought the first lawsuit, and that completely took all of the minerals? A. Yes, sir.

Q. Of that $3,000.00, how much of that mineral value would you say in your estimation was reduced to your ownership, and how much to the oil and gas lessee, that is the Magnolia Oil Company, they had the lease on it? A. I don't know what they valued their damage at.

Q. Was this just your portion of the damage? A. That is what I valued when I arrived at this figure, that is what I valued my mineral tract at.

124 Q. Just your portion? A. Yes.

Q. Mr. Davis, on your property of 118E, after the easement was brought had a clearance easement of 32 feet and 85 feet on the south line. Were you after that still able to farm the crop land in the same manner and using the same tools as you had previous to the Government bringing this lawsuit? A. That is on the first one?

Q. Yes. A. Yes, sir.

Q. Now then, sir, let's got to 142E, that is the second clearance easement? A. Yes.

Q. 17 feet on the north side to 42 feet on the south side. After that was imposed upon your land are you still able to operate your machinery under that clearance and farm it in the same manner which you were before the suit was brought? A. Yes, sir.

Q. There wasn't anything on your farm that was high enough to protrude up that high, was there? A. On the second taking?

Q. Yes. A. Yes.

Q. What was it? A. Light poles over there at that well.

Q. Light poles? A. Yes, I wanted to put an electric pump on that well and I had to go see about the easement on it.

Q. Was that well located on the fee, or on the part you have left? A. Just over the fence on my side. It is not three foot from the fence.

Q. But it is not in the area that was taken? A. No.

Q. So it didn't affect it any, did it? A. I can't use it any more.

125 Q. You can't use it? A. No, I can't put no house over there. The only use would be for watering my stock, and I would have to get under that 17 foot then.

Q. What is it you want to stick up more than 17 feet high? A. Light pole, R.E.A. pole, it would be over 17 feet high.

Q. Where is that you are talking about? Show me on the map? A. It is right there where the old house was.

Q. Here is your little 15 acre square, here is west, this ease. A. That house was about the center of the north and south line there. It is right there at that old house. It would be in the neighborhood of right there. (Indicating)

Q. That is in what was taken in fee? A. No, the well was over on my side. The well is on the west side.

Q. It is on the west side now? A. Yes.

Q. And it is right about the middle? A. Yes.

Q. Along about here? A. About the center there.

Q. And that is at an elevation of between 1910 and 1915, along in here, about 1910 or 1912 foot elevation? A. I wrote the Army Engineers up there, and they told me that was 14 foot, approximately 14 foot. I had the R.E.A. check it too.

Q. It is 17 feet here? A. That is out there. It—the runway comes down the center of this block of land they took away from me.

Q. No, the runway ends right here. A. No, it don't. That is south of my property. There is no runway on my property, it would be down this way. There is no runway beyond this here.

126 Q. This would be the end of the runway, and this

is 1,000 foot clearance zone. A. That is the blacktop area right there, and here is what they took away from here. It is the end of the runway, planes come right down it.

Q. Sir, how much an acre do you value your remaining 44.51 acres of land with the clearance easement on it? A. The remaining how much?

Q. 44.51 acres. A. $4,451.00.

Q. $4,451.00? A. Yes, sir.

Q. Did you know that you, if you calculate all the damages which you have testified to, and you have to subtract the value of your land from the damages, that you have 44.51 acres subject to an easement left, and are damages $1,721.50 more than the land you had? A. Sir?

Q. If you add up all of your figures—A. That would be $22,250.00.

Q. $22,250.00, all your damages? A. Yes, sir.

Q. And you said your property was worth to start out with $18,000.00? A. That was in the first taking.

Q. You said the land didn't change in value? A. If we are going to put the sand pit, what I sold plus what was left out there.

Q. You did value the area which had the sand pit on a cubic yard basis for 8¢ per cubic yard. That is how you reached that $8,000.00? A. Yes, I took off $970.70 from what it actually figured up.

Q. But it was on a cubic yard basis? A. Yes.

Q. And so much per cubic yard? A. Yes.

127 Q. How many acres of this area did you have left that had sand in it? A. How much of the area that I had?

Q. Yes. A. I didn't have any of it left.

Q. Were you farming this area here where the sand was hauled from? A. No, sir; I was farming right by the side of it.

Reporter's Note: At this time the hour of 12:00 o'clock noon has arrived, and the hearing was recessed until 1:15 P.M. o'clock September 8, 1959.

At said time the parties appearing as heretofore, and the following proceedings were had, to-wit:

ROBERT DAVIS, recalled as a witness, having been heretofore duly sworn, testified as follows:

Further Cross Examination by Mr. Camp:

Q. Mr. Davis, I was trying to recall for sure, did you testify that this took all of your sand in this 5½ acres that had commercial value? A. I testified that was sand that they was using, and this other—this over in this other pit was a different sand. It don't compact like that other did, and they never could get the compaction out of it like they did the other. They tried to use this other.

Q. Where is this other? A. On my property just over from the Base fence.

Q. Does it have a value to sell as sand? A. It is not like that other one, they couldn't use it.

Q. Have you been able to sell it? A. No, sir, because it is a different kind of sand.

Q. And all the sand you have been able to sell off of your place was the part that was on the 15 acres? A.
128 No, sir; I tried to sell that, they bought a little sum. L. M. Jones tried to use it, and Kiewitt tried to use it.

Q. Mr. Davis, according to my calculations, starting of July 16th of this year, and up through August 25 of this year, you have sold 2,394.00 cubic yards to Peter Kiewitt for use there on the Base from your remaining land. Is that correct? At 10¢ a cubic yard? A. No, sir, not since July of this year. I haven't sold no sand this year.

Q. You haven't? A. No, sir, I haven't sold no sand this year.

Q. Do you know Al Griner, who is the foreman or manager of the Peter Kiewitt contract there on the Base? A. Yes, sir.

Q. But you say you are not selling any sand presently to those people? A. I am afraid you have a different Davis.

Q. What Davis would that be? A. I imagine that is James B. Davis, north of Burns Flat.

Q. Where is his farm located? A. Adjoins Burns Flat on the north.

Q. There is other land in the area there which has been used for building runways or parking aprons, as fill as your land was used where it was closer to it, hasn't it? A. No, not since they took it away from me. After they took that pit away from me they went to looking for other sand and they found some.

Q. They found some up on the north end of the Base? A. I don't know.

Q. You don't know whether the Merz boys sold 108,000 cubic yards for use up on the north end of that Base, the same kind of dirt they used for parking aprons? A.
129 It is not the same kind of dirt. I didn't know about them selling it.

Q. How do you know it isn't? A. That is black land over there, and that is sand down there.

Q. And have you examined it? A. I have been by there.

Q. Did you see them out there hauling, taking the top off, and stock-piling it, and taking the sand like you had, and putting the dirt back on top? A. It wasn't like that sand down there.

Q. They did use it for building a parking apron, and all of that north end? A. I think most of that sand came from John Rainbolt's pit.

Q. 108,000 cubic yards was about twice as much as you sold them, wasn't it? A. I don't know how much they sold them up there, I don't know nothing about it.

Q. That is all.

Redirect Examination by Mr. Meacham:

Q. Did you sell any of this sand to anybody besides the contractors on the Base? A. Yes, sir.

Q. Who did you sell it to? A. Sold it to the County Commissioner, Jess Lynn; and sold it to the Cordell Schools, they used that sand for base to build that concrete deal school with, and used it for trailer courts, and Fred Stinson hauled it down to Dill and put it under the F.H.A. houses down at Dill.

Q. What did they use for *for* road construction? What did Jess Lynn use it for? A. He used it to put on top of it to mix the oil and blacktop with it.

Q. Has there been road construction in that area since March 4, 1957? A. Yes, sir.
130 Q. As well as before March 4, 1957, before this land was taken away from you? A. That blacktop road went through there.

Q. And there has been construction since that time? A. Yes.

Q. On March 4, 1957, was there any pit between your place and the City of Cordell? A. Not that I knew of.

Q. How far is it from Cordell to your pit? A. 16 or 17 miles.

Q. Was there any between your pit and Dill City? A. No, sir.

Q. You mentioned something about John Rainbolt. How far is that pit from the Base? A. 16 or 17 miles.

Q. Was it in operation on March 4, 1957? A. No, sir.

Q. That is all.

Mr. Camp: That is all.

The Witness Excused.

Mr. Camp: We move the testimony of the foregoing witness be stricken, for the method of valuation not being proper as to the pit.

Mr. Whiteside: Overruled.

E. E. SMITH, of lawful age, called as witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

131 Direct Examination by Mr. Meacham:

Q. State your name? A. E. E. Smith.

Q. Mr. Smith, where do you live? A. I live at Dill at the present.

Q. How long have you lived at Dill? A. About 6 months, or seven (7).

Q. Where did you live prior to that time? A. Out on the farm. I was three miles south and two west of Burns Flat.

Q. How long did you live there on that place? A. I lived there 43 years.

Mr. Meacham: This is Tract No. A-119E, the south end of the Base. There is portions of the NE ¼ SW ¼, SW ¼ SW ¼ and the S ½ SW ¼ NW ¼ of 27-10-39, a total of 140 acres.

Q. Did you own that land on March 8, 1956? A. Yes.

Q. Is that the land you lived on 43 years up to six months ago? A. Yes.

Q. How much land do you own there altogether? A. 140 acres; 1.8 acres the Base taken for a road.

Q. On March 8, 1956 how much did you own down there? A. I owned the whole 140 acres.

Q. In the 43 years that you have lived out there have you kept up with the sales of real estate in that area? A. Well, I believe I have.

Q. Do you think that from keeping up with those sales that you would know the fair cash market value of land in that area? A. I think I would.

132 Q. Do you think you knew the fair cash market value as it was on March 8, 1956? A. Yes.

Q. What was the fair cash market value of your 140 acres on March 8, 1956? A. Well, there is several things enter into it, but I belive it was worth $30,000.00, around that.

Q. Approximately $30,000.00? A. Yes.

Q. Now, have you read or heard read to you this easement that the government imposed? A. Yes, sir, I studied it thoroughly.

Q. This easement, it has been agreed runs from a height of 81 feet on your north line to 145 feet on your south line. Do you think the imposition of that easement onto your 140 acres decreased the fair cash market value of that tract? A. I believe it did.

Q. Do you have an opinion as to how much it decreased the fair cash market value of your property? A. Yes.

Q. How much did it decrease it? A. Well, I think about half.

Q. About $15,000.00? A. I think that would be a fair estimate.

Q. Why do you say that? What is your basis? A. Well, land that has got the easement on it has decreased in price, and no sale for that with an easement on it.

Q. Tell the Court a little bit about your land. They have just become interested in this problem out there, and they would like for you to tell them about your land. How much of it is in cultivation? A. 112 acres in cultivation.

Q. How much was in cultivation on March 8, 1956? A. About that.

133 Q. What sort of improvements did you have on the

place? A. I did have good improvements, but I haven't kept the improvements up since the base established there.

Q. We are interested Mr. Smith in March 8, 1956—on March 8, 1956. What improvements did you have on that place at that time? A. House, barn, chicken house.

Q. And what else? A. Hog house, and two wells, windmills, cellar, and house built over the cellar.

Q. How many rooms in your house? A. Nine (9) rooms.

Q. Did you have a shelterbelt out there? A. Yes, I had three shelterbelts.

Q. Was it necessary to move one of those shelterbelts? A. Well, they wrote to me and told me they was, but they didn't go through with taking it.. So I don't know what they decided about it.

Q. You know on the ground where this 138.73 acres is, it practically covers all of your 140 acres? A. Yes, and I don't know where the idle acres are.

Q. That is all.

Cross Examination by Mr. Camp:

Q. Who was this, you said they wrote saying you had to do something to a shelter belt? A. The Army, I suppose, or someone.

Q. Is that the gentlemen *setting* back there? A. Wasn't it you that wrote that to me?

Mr. Huss: No, I didn't write you a letter.

134 Q. Is this the gentleman? A. No, I don't believe that is the man.

Q. Mr. Smith, who was it? A. Well, it was from the Army Engineers at Tulsa.

Q. You don't have any trees out there 18 feet high, do you? A. I don't have to have them that high, do I?

Q. They have to extend up here where they have to top them, that is what it says in that taking? A. That is what they wrote me. I will tell you what they wrote me if you want to know.

Q. I would like to know. A. They wrote to me and told me my shelter belt would have to come down, and I would be paid to do it. The Army Engineers would pay me to do it, and they wrote to me they would give me $900.00 for the shelter belt and a roadway across an 80 acres if I would drop this last lawsuit you are having today.

Q. Do you have that letter with you? A. No.

Q. Do you have it at home? A. I don't know whether I have it or not.

Q. Do you know who wrote it? A. No, I can't recall now.

Q. Subsequent to that, or after that they did acquire a roadway easement off of you, didn't they? A. What?

Q. They did get a roadway across you? A. Well, it wasn't before that.

Q. It was after that? A. Last year they paid me for the easement, last year.

135 Q. Which one of these shelter belts was it that you are talking about? A. The one on the south end of Bud Davis' land, between me and Bud.

Q. Next to the blacktop highway? A. Well, it joins the blacktop, and extends about 50 rods up on the line between me and Bud Davis.

Q. Did you ever measure any of those trees out there? A. No, I haven't.

Q. You don't have any out there anywhere near 80 feet high? You don't have any 60 feet high, do you? A. I think they would be 60 foot trees.

Q. They wouldn't be any taller than that? A. I don't think so.

Q. So they would have to grow a long time before they got up to where they would cut the tops out of them, wouldn't they? A. Well, pardon me for not answering your question, but Bud Davis' south line is 42 feet, isn't it? I have trees taller than that.

Q. Your property line is 81 feet. A. What is Bud Davis's?

Q. Well, we will have to figure that out here on this contour map and see. Yours is in the first Declaration of Taking, is that right? A. Yes, sir.

Q. And his in the second? A. Yes.

Q. So the difference there is 40 feet, Mr. Davis's on the north side is 42 feet. A. Not on the north side.

Q. On the south side where it adjoins you? A. Yes.

Q. Your north line? A. Yes.

136 Q. Your north line is 81 feet because they are separate lawsuits. Do you understand that? A. Yes.

Q. Getting back to the 81 feet, you don't have any trees

out there nearly that tall? A. I wouldn't say that, they are about 60 foot.

Q. Now then Mr. Smith, how many acres do you have there in you duck pond? A. About six acres.

Q. That is out sort of in the center of a field? A. Yes.

Q. You can't see that from the road, you can just see the weeds around it, can't you? A. I guess so.

Q. You still have all the land out there farming that you had before the lawsuit was filed, and you can still farm it as you could before, can't you? A. I suppose so.

Q. Now then, it is not a matter of supposing. No question about you can run your machinery out there across there and farm the 145 feet on one end, or 81 feet on the other end? That doesn't interfere with your farming? A. No, sir, it doesn't.

Q. That is all.

Questions by Mr. Whiteside:

Q. Mr. Smith, when did you move from your house on this A-119E? A. The first of this year, 1959.

Q. Are any of those improvements protruding up above this glide angle? A. No, sir.

Q. That is all.

137 Mr. Camp: That is all.

Mr. Meacham: That is all.

The Witness Excused.

BERTHA ROGERS, of lawful age, called as a witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination by Mr. Meacham:

Q. State your name? A. Bertha Rogers.

Q. Are you the same person as Bertha Kenney Rogers? A. Yes.

Q. Where do you live? A. Cordell.

Q. How long have you lived at Cordell? A. Since 1942.

Q. Prior to 1942 where did you live? A. Burns Flat.

Q. Tract A-122E is a part of the West Half of the West Half of the Southeast Quarter of 27-10-19. That

easement covers 11.52 acres of that 160 acres. Do you own that land? A. Yes, sir, I do, in connection with my two daughters.

Q. What are their names? A. Juanita Nagel of Tulsa, and Wanda Riggins in Oklahoma City.

Q. The three of you own that land in equal shares? A. Yes.

138 Q. How much land do you have there altogether? A. In this one tract?

Q. Yes. A. 160 acres.

Q. You own some other land in that area? A. Yes, I own 80 acres across the road south.

Q. This 160 acres, how long have you lived—how long have you owned that 160? A. Since 1926.

Q. You have owned it since 1926—33 years? A. Yes.

Q. Since 1926 do you know the sales that have been made in that particular area of real estate? A. Some, maybe not as much as the men folks do, but I know some about it and I know my own.

Q. From your knowledge of those sales do you think you know the fair cash market value of this property? A. Yes, I do.

Q. Do you think you knew that fair cash market value on March 8, 1956? A. Yes.

Q. What was the fair cash market value of the 160 acres on March 8, 1956? A. $250.00 an acre.

Q. $250.00 an acre for 160 acres, that would be $40,000.00? A. Yes.

Q. Have you read this easement? A. Yes, sir.

Q. It takes 11.52 acres of your 160, and do you know what particular 11.52 acres it takes? A. Yes.

Q. Do you think the imposition of this easement on your property reduced its fair cash market value? A. Yes, I do.

139 Q. How much? A. $50.00 an acre on the whole thing.

Q. You think that the fair cash market value of this property prior to the taking of the easement was $40,000.00, and immediately after the taking the easement it was worth $32,000.00? A. Yes, I do.

Q. You think this easement reduced its fair cash market value $8,000.00? A. Yes.

Q. Tell us about your farm. How much of the land is in cultivation? A. All of it except where the house and improvements are.

Q. 152 acres in cultivation? A. Yes.

Q. What crops do you raise? A. Cotton and maize.

Q. Is it flat or rolling? Do you have any canyons? A. No, it is flat.

Q. You restified it reduced your fair market value $8,000.00. Tell the Court why? A. Just the fact the easement was put on it and it gave somebody else an interest in the place besides me. Should a person go to buy it, it isn't something you can see and look at it, if you go to buy it you will go to the records, there your title is clouded, and that is the only way to put a valuation, because it isn't something you can see.

Q. That is all.

Cross Examination by Mr. Camp:

Q. How many acres did you say Mrs. Rogers, did you have in your farm that was farmable, or tillable? A. 158, I believe.

Q. And how many acres are there in there now since the government imposed this easement? A. It is all the same.

140 Q. Didn't change anything? A. No, sir.

Q. That is all.

Questions by Mr. Whiteside:

Q. Mrs. Rogers, this approximately 12 acres that is covered by the easement, are the improvements on that place within that? A. No, sir, it comes just to the edge of the house, doesn't take in the house or any improvements.

Q. That leaves 148 acres approximately that is not in the easement, is that correct? A. Yes.

Q. Your valuation of $8,000.00 on the portion covered by the easement, leaves a value of $32,000.00 for the remaining 148 acres, is that correct? A. No, sir; I mean that there was a $50.00 an acre damage the farm over.

Q. If you didn't own that 11.52 acres at all, how much do you consider the remaining 148 acres would be worth? A. Well, that would be hard to say.

Q. It would still be worth $250.00 an acre? A. No, I

don't think so, not with this part took out of it. It wouldn't to me if I were buying it.

Q. Is this land under an oil and gas lease? A. No, sir.

Q. Was it at the time of the taking? A. Yes, sir.

Questions by Mr. Tisdal:

Q. Did they drop the lease on the whole 160, or just on this part? A. On the whole 160.

Q. In other words the oil lease was affected on the full 160? A. Yes.

141 Q. That is all.

Further Cross Examination by Mr. Camp:

Q. Was it affected, or as a matter of fact didn't it expire on December 5, 1957 at the expiration of the lease? A. Wasn't it 1958?

Q. I believe the lease was entered into on December 5, 1947, 10 years later it expired because that was the end of it, not because of this, isn't that right? A. Well, perhaps so, if you have the figures there on it. I know I never did get any oil lease checks after the easement went on, I got one after the easement went on.

Q. It went on in 1956, so you got a check in December of 1956? A. Perhaps that is right.

Q. The easement went on in March of 1956 and you got a check in December of 1956, and then the lease expired by the terms of it? A. They paid ahead, and the lease didn't expire until the fall of 1957.

Q. That is how the lease ended? A. Perhaps so.

Q. That is all.

Redirect Examination by Mr. Meacham:

Q. There is not an oil and gas lease now? A. No.

Q. That is all.

Questions by Mr. Whiteside:

Q. You and your two daughters own all of the minerals lying under this land? A. Yes, except the 11.52 acres; I don't know about that, but we haven't sold any.

* * * * *

142 R. B. HOOVER, of lawful age, called as a witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination by Mr. Meacham:

Q. State your name? A. R. B. Hoover.

Q. What do you do? A. Banker.

Q. First State Bank, Foss, Oklahoma.

Q. What connection do you have with the bank, what is your official capacity? A. President.

Q. How long have you held that position? A. About 10 years.

Q. As President of that bank, do you have a Vice-President who makes the real estate loans, or do you do that yourself? A. I do that myself.

Q. Have you had any experience in the real estate business, or real estate transactions during the 10 years you have been President? A. I have.

Q. What did you do prior to that time? A. I have been there since 1930.

Q. During that time have you handled real estate transactions? A. Yes.

Q. Have you leased oil and gas leases? A. I have.

Q. Do you think you know the fair cash market value of real estate *aroung* the Clinton-Sherman Air Base? A. I have a pretty good idea.

Q. Do you think you know the value as of March 8, 1956? A. I think so.

143 Q. Do you think you know the value of oil, gas and minerals in that area on March 8, 1956? A. I wouldn't know the exact value, but I could come close to it.

Q. Do you think you would know just about as much as anybody about the fair cash market value of property out there? A. I would try to get close to it.

Q. Tract A-124E, the SE ¼ of the SW ¼ of 27-10-19. Do you know who owns that 160 acre tract? A. My mother, Ella B. Hoover.

Mr. Meacham: If the Court please, Mrs. Hoover is an elderly lady, and we have agreed she might make this proof to ownership.

Q. What relationship are you to Mrs. Hoover? A. Son.

Q. This easement covers 40 acres? A. Yes.

Q. It has been agreed the easement runs from a height of 105 feet on the north line to 145 feet on the south line, Do you know the fair cash market value of this 160 acres on March 8, 1956? A. I would say $40,000.00.

Q. Do you think the imposition of this easement running at the heights outlined decreased the fair cash market value of that property? A. Certainly has.

Q. Are you familiar with these easements? A. Yes.

Q. Have you read it? A. Yes.

Q. How much do you think it decreased the fair cash market value of that 160 acres, the imposition of this easement on 40 acres? A. At least half, if not more.

Q. That would be $20,000.00? A. That is right.

144 Q. Why do you say that, Rex? A. Because you can't find any buyers. Before that you had buyers every day wanting to buy it, but since that easement has been imposed and a suit filed there hasn't been anybody interested in buying the 40, or any of the rest of it.

Mr. Camp: We object to all of this testimony as immaterial, improper and incompetent, and move it be stricken from the record as to offers and that type of testimony.

Mr. Whiteside: Sustained.

Mr. Meacham: Exception.

Mr. Meacham: If the Court please, our theory on it was the fair cash market value, that would be as all of us know and as the Judge outlined to you, is what a willing buyer would pay a willing seller, and a function of that valuation, it sems to me, would be the demand. We didn't have in mind to mention any dollars or cents offers, which, of course, are not competent. Our showing there was no demand.

Mr. Whiteside: I understood his answer to be not only this property, but to all of this other property that had this easement on it.

Mr. Meacham: I think it would be irrelevant from this witness as to the others.

Mr. Whiteside: That is what I understood his answer to be.

Q. Let's pinpoint it to this particular tract. What you said applies only to this particular tract? A. Yes.

Questions by Mr. Gillespie:

Q. Do I understand his testimony to be that prior to the taking of the easement he personally had people
145 to inquire about buying this particular farm? A. That is true.

Q. Since that time you have not? A. Yes.

Mr. Camp: We renew our objections to that type of testimony for the reason that gets into the realm of speculation and conjecture, offers and lack of offers is not a proper *critera*. The actual sales being consummated is what a willing buyer and willing seller says something is worth, and from those values we determine what the correct value is. But not what somebody offers or didn't offer, and we don't know what other considerations the people took in when they said they wouldn't buy it. It might as well be items not included in the flight area.

Mr. Whiteside: We will let it stand that he had offers before the action, or before the taking, and hasn't had any since, for what it is worth.

Q. How many acres of farm land on this property, sir? A. 160 acres, less the improvements.

Q. All tillable land? A. That is right.

Q. And what does that good tillable land like that sell for, sir? A. Well, I said we could have sold it for $40,000.00, which would be about $10,000.00 a forty. I never figured it by the acre.

Q. Is that about $250.00 an acre? A. 160 divided by $40,000.00, I never figured it by the acre.

Q. That easement runs from 105 feet to 145 feet over this particular land. There was nothing on there that had to be removed, was there? A. Not to my knowledge.

Q. You are familiar with it, aren't you? A. Yes, sir; but there wasn't anything on it.

146 Q. Who lives out there? Your mother? A. No, Edward Gunter.

Q. Lives in the house to the south of the road? A. That is right, he doesn't live on the 40. He lives right across the road.

Q. He lives on the 120 that is across the road to the south? A. Yes.

Q. Only the 40 acres to the north is affected by this?

A. Yes, but I wouldn't say that. If affects the whole farm.

Q. He can still farm it in the manner he could before, could he not? A. As far as I know.

Mr. Meacham: On Tract A-123E, it is 7.99 acres. The only thing involved in this hearing is the minerals. Charles O. River and his wife owned 5/16ths of the minerals, and six (6) other people owned 1/32nd. In other words the only thing involved in this hearing is one-half (½) of the minerals under this 7.99 acres.

Q. Rex, Tract A-123E is 7.99 acres in the East Half of the East Half of the Southeast Quarter of Section 28, Township 10, North of Range 19, W.I.M., Washita County, Oklahoma. If you will come and look at this map right across from the Smith property? A. Yes, I know exactly where it is.

Q. Are you familiar with that land? A. I am.

Q. Do you know the fair cash market value of the minerals under 7.99 acres on March 8, 1956? A. Yes, I think so.

Q. Make it 8 acres to be figured. A. I wouldn't know what the minerals would be worth. I would say this, that I leased our place down there—

147 Mr. Camp: We object to any testimony from this witness. He says he doesn't know what the value of the minerals are worth.

A. Well, $50.00 an acre.

Mr. Camp: We move that answer be stricken from the record as irresponsive. He says he doesn't know.

Mr. Whiteside: You can tell what you know, otherwise you could say you don't know.

Q. In other words Rex, do you think you have just as good an opinion as the next fellow from your oil and gas leasing, and things of that sort in this whole area? Do you think you would know the fair cash market value of this 8 acres of minerals on March 8, 1956? A. I would say $50.00 an acre.

Q. That would be $400.00 for 8 acres? A. Yes.

Q. A half of that would be $200.00? A. That is right.

Q. Do you think the imposition of this easement on that property which is 105 feet on the north line to 145 feet on the south line, do you think the imposition of that ease-

ment would hurt the value of that property? A. I think it would take it plumb out.

Q. You think the fair cash market value of this $200.00, which is half of the minerals, after the imposition of this easement would be nothing? A. It would be nothing. I think it would nullify it.

Q. That is all.

Cross Examination by Mr. Camp:

148 Q. Mr. Hoover, on Tract A-123E as to the minerals, did you testify that in your opinion $50.00 was the full value per acre? A. Well, yes.

Q. Rivers and McDonald had part of the minerals? A. Yes.

Q. Do you know whether or not there was an oil company that had a lease on this land at that time? A. I am almost positive there was, yes.

Q. How much of that $50.00 an acre would you attribute as a loss to the oil company who had an 7/8ths interest in the minerals? A. How much loss?

Q. Yes. A. For the oil company?

Q. That is right. A. As far as the lease is concerned they lost it all.

Q. They lost it all? A. No, they were repaid, weren't they?

Q. I am asking you. You are testifying here as an expert what you consider it, the division of this $50.00 per acre. How much of that *whould* go to the mineral owner and how much to the oil and gas company, the lessee? A. That is a hard question. I don't believe any oil company would even attempt to drill it, which would make the minerals worthless.

Q. Answer the question. You haven't answered the question. It is the same question we have been discussing for quite a while, how are you going to divide the $50.00 between the oil company and the mineral owner, what proportion, 7/8ths and 1/8th? A. It is 7/8ths and 1/8th.

149 Q. Would the lessee be entitled to the 7/8ths of $50.00 an acre, and the lessor 1/8th of $50.00 an acre? Are you familiar with oil and gas leasing? A. I have bought a jillion of them.

Q. Are you familiar with the valuations of which the

lessee has, and which the lessor have? A. That *depend* on the area.

Q. In this area? A. 7/8ths and 1/8th.

Q. Then if you would take that away from them what percentage would go each way? A. It would all amount to the same thing, the landlord only gets 1/8th.

Q. It is your testimony the royalty owner here is only entitled to 1/8th of $50.00 an acre, and only half of that is involved, and he is only entitled to 1/16th? A. No, the landowner, when he leases it, gets a bonus.

Q. Maybe. A. It don't make any difference whether it is $10.00 or $100.00, 1/8th is all he gets. The oil company gets 7/8ths. When you deprive him of that he is not able to get $50.00 an acre, $25.00, $10.00, or $1.00.

Q. This was under lease at the time? A. Yes.

Q. Would you please divide that up? A. I couldn't divide it up, because I don't know anything about that operation.

Further Cross Examination by Mr. Cress:

Q. You testified that the value of the mineral interest out there was $50.00 per acre? A. Right.

Q. There are two people who own that out there, one of them that has the lease out there and one the landowner. Do you split that $50.00 between the two? A. No.

Q. What do you do? A. To the landowner.

150 Q. The landowner at the time we took it would be entitled to 1/8th of $50.00 and then 7/8ths to the oil and gas company? A. No.

Q. Would you explain it? A. It depends on the sale price. He might be able to sell it for a bonus, for more than that.

Q. The total value as far as you are concerned is that $50.00 per acre, *we* are agreed on that? A. Yes.

Q. Would you tell the Commission please, what interference or what rights have we taken away from the oil company in order to produce oil or gas from 7.99 acres in a quarter? Can you tell us how we have interfered with the development of that 8.00 acres? A. No oil company would drill it.

Q. Explain why? A. Because they can't put a derrick on it with an air easement over it.

Q. There is only 8 acres involved? A. They might want to drill on that 8 acres.

Q. Isn't it possible that an oil company out of 80 acres could move over a short distance and drill, drain the 8 acres? A. There is a possibility.

Q. Isn't it also probable that within 100 and some odd feet they could put a derrick on this 8 acres if they wanted to do that? A. That would depend on the height.

Q. Aren't there many derricks that are lower than that *that* operating in this country that you are familiar with? A. Most of them are 134 feet.

Q. That comes within the easement on this 80 acres? A. I don't know.

Q. You don't even know the height that we can build a derrick on here? A. No.

151 Q. And you are testifying they couldn't put a derrick up and you don't even know the height of this easement, is that correct? A. Well, I haven't been told what the height was.

Further Cross Examination by Mr. Camp:

Q. Are you familiar at all with regulations prescribed by the Corporation Commission as to where an oil well can be drilled in Oklahoma? A. Yes, sir; depends on what they say the spacing is.

Q. Then you should be familiar with the fact that they can't drill more than 330 feet from the property line? Are you familiar with that? A. No, sir, not exactly.

Q. And this is only 295 feet out into this property, isn't it? A. I wouldn't say, I wouldn't know.

Q. Would you look at the map? A. Yes.

Q. From here to here. A. Whatever spacing they set on it, I wouldn't have the least idea.

* * * * *

Mr. Camp: We renew our objection and move to strike the testimony of this witness as an expert for the lack of qualifications.

Mr. Whiteside: The objection will be sustained as to the oil and gas lease. That testimony is stricken as to Tract A-123E.

Mr. Meacham: Exception.

Mr. Meacham: On the Merz tract, A-104E which is the Merz tract, an undivided one-fourth of the minerals non-participating is owned by Mr. Henderson who is here. It gets a little bit fine as to the non-participating and
152 the participating, so Mr. Henderson and the Merz boys have both agreed that this Court need not differentiate between the participating and the non-participating, and a check for the undivided ¼th of what you determine the interests to them and the Prudential Insurance Company, and George and I have agreed that is alright.

Mr. Camp: It is my understanding Mr. Meacham represents both of the parties. However they desire the award that is the way we will try to make it.

L. A. WILLCOX, of lawful age, called as a witness on behalf of the Landowners, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination by Mr. Meacham:

Q. State your name? A. L. A. Willcox.

Q. Where do you live, Mr. Wilcox? A. Oklahoma City.

Q. What do you do? A. I have charge of the southwest part of the United States making farm and ranch loans for an insurance company.

Q. What company is that? A. Mutual of New York.

Q. What are the nature of your duties as District Manager for the southwest part of the United States for that company? A. Everything in making, processing, and servicing loans. That includes making appraisals and determining values, recommending loans, closing them.

Q. Is Washita County, Oklahoma, in your district? A. Yes.

153 Q. How long have you been with Mutual of New York as District Manager? A. Since 1945.

Q. What did you do prior to 1945? A. Same thing with another company.

Q. Did your area then include Washita County, Oklahoma? A. Yes.

Q. How long did you hold that position? A. Well, I was in Oklahoma 10 years previous to that.

Q. In other words since 1934, and you have been appraising real estate in Oklahoma including Washita County, Oklahoma, is that correct? A. Yes.

Q. What did you do prior to that time? A. Same thing.

Q. For another company? A. No, I was with the same company. Let's put it this way, since 1926 I have been doing that in the United States, various areas of the United States, and I have been with a total of three companies.

Q. And in connection with that you have appraised real estate all over the United States? A. Yes.

Q. Have you appraised real estate in Washita County all during that period? A. No, sir, since 1934 or 1935, about the first of the year in 1935.

Q. Do you think you know the fair cash market value of real estate at that time in Washita County, Oklahoma—at this time in Washita County, Oklahoma? A. Yes.

Q. Do you think you know the fair cash market value of real estate in Washita County, Oklahoma, as of March 8, 1956? A. Yes.

Q. And as of March 4, 1957? A. Yes, sir.

154 Q. Have you read the easement that is involved in this little controversy we are having here? A. Yes.

Q. Are you familiar with that easement? A. Yes, sir.

Q. In connection with Tract A-104E, which is—which covers 134.70 acres in the Southwest Quarter of Section 3, Township 10 North, Range 19 W.I.M., which we refer to as the Merz land, and which has an easement running from 13 feet on the south line, to 50 feet in the center, and 70 feet on the north line. First, do you know the fair market value of that particular Southwest Quarter on March 8, 1956, prior to the imposition of this easement? A. I have my opinion of it.

Q. In your opinion what was the fair market value of it? A. Of the 160 acres?

Q. Yes. A. $40,000.00.

Q. On March 8, 1956? A. Yes.

Q. Do you think the imposition of this easement on the property on March 8, 1956 decreased the fair cash market value of that real estate? A. Yes.

Q. How much? A. $27,108.00.

Q. In your own way briefly tell the court why you think that the fair cash market value of that real estate has been decreased that much? A. An easement on a piece of land is a co-ownership in that piece of land, regardless of what the easement says. It is a co-ownership. If two people own apiece of land they can each one of them, each of them has a part of the value of that tract of land. One can sell and the other doesn't have to, therefore a number of buyers that are interested in buying a co-ownership is limited. The limitation of the probability of those buyers coming in is limited to the extent of the limitations
155 of that co-ownership. Therefore, if an easement limits or restricts the other owner to an active interest in that land, naturally the full value of that land is affected. Now then, I worked out a formula on this that is based on the amount of air that is affected in this particular type of easement. If the easement took all of the air clear down to the ground, and restricted the use as the easement specifies there you couldn't even walk across that land hardly, but if it is up here two (2) feet you can grow Buffalo Grass on it, if it is up here five feet you might be able to grow some bumble-bee cotton on it, but it might be a little difficult to get in there and harvest it. You couldn't get in there with a mechanical harvester. If it is up there a little higher you couldn't grow some of this tall sorghum, some Atlas Sargo, or that type of crop. Then you get up a little higher than that and you are restricted even to the extent of your certain buildings and *windmilles* for water for livestock. If you get up a little higher you are still restricted from the standpoint where your buildings are, and now in these days of television, to get some of these television stations around here you have to put up a pretty high aerial up there. So you are restricted on that.

To determine the amount of damage that have been incurred in each one of these tracts I took what happened to be the first one, and happened to be the highest priced one, and started working from that basis up to 200 feet. Now, 200 feet gets you above anything that is in this set of easements here, but it doesn't get you up to the height that you don't have to worry about, surveying to see

whether you are going to run up there two (2) feet over this easement or not, and I came up with a formula on the basis of $300.00 an acre, $1.50 per foot of the height. In other words, measuring down from 200 feet up here you are affected $1.50 a foot until you get down here to 200 feet. You are taking the full—I mean from 200 feet up here to the ground, you are taking the full $300.00 per acre of your value. Now then, on this particular tract there were 134.70 acres of land affected, the easement starts in at 13 feet and goes out at 65 feet, that is
156 an average thickness of 39 feet—or, rather 78 feet, an average thickness of 39 feet. So that you have got an average thickness from the ground up of 39 feet that is unaffected, and 161 feet up here that is affected. Now, $250.00 an acre which was the value that I placed on this security is 83⅓rd percent of that $300.00, or $1.50 a foot, and there is 161 feet affected. So that tract on the basis of the formula figures out $201.25 an acre in value. On 134.70 acres, that $201.25 an acre is $27,108.38.

Q. Let me see Larry, you take the 200 feet from the surface of the ground up to 200 feet, that represents 100 percent of the value? A. Yes.

Q. And like in this instance what it boils down to, you testified this was $250.00 an acre land and— A. $300.00, and 88⅓ percent of $300.00 is $250.00.

Q. 200 feet represents 100 percent of the value? A. Yes.

Q. And each foot it encroaches, for instance if it was $200.00 an acre land, and one foot down from the top 199 feet, that would be $1.00 per acre of the land affected? A. Yes, sir.

Q. And on this particular land you took $250.00 as its value and figured each foot with equal weight? A. That is right.

Q. That way when it gets down real close you have big value, when it gets up a little higher you have a different value? A. That is right.

Q. Do you have the minerals separate as to the Merz tract? A. Yes, sir.

Q. What value do you have for the minerals? A. I have $75.00 an acre on the value of the minerals there.

157 Q. And do you have the damage separate as to the minerals? A. I gave that 100 percent damage on that.

Q. In other words the minerals were $75.00, the fair cash market value of the minerals were $75.00 before the imposition of the easement and nothing after? A. Right.

Q. On that particular tract we have ¼th to deal with. On Tract No. A-106E, which we refer to as the Guthrie Tract, the easement covers 83.70 acres in Lot 2, Lot 3, in the SE ¼ NW ¼ and SW ¼ NE ¼ 3-10-19. Are you familiar with that tract? A. Yes, sir.

Q. What was the fair cash market value of the entire 160 acres? A. I averaged that across at $225.00 an acre.

Q. On March 8, 1956 the average fair cash market value was $225.00 an acre? A. Yes.

Q. And that would make a total for the 160 at what? A. $36,000.00. I had a building value on top of that, $12,200.00.

Q. What was your overall value of the 160? A. The overall value of the 160 acres would have been $48,200.00.

Q. This easement, it has been stipulated runs 71 feet on the south line to 163 feet on the north line. Do you think the imposition of that easement decreased the fair cash market value of that property? A. Yes.

Q. How much? A. $31,032.50.

Q. On the Guthrie land you think the value was decreased $31,032.50? A. No, I am looking wrong here. $12,922.51, that was the amount of the damage.

Q. $12,922.51. Explain to the Court how you arrived at that diminution of the fair market value of
158 $12,922.51? A. I used the same formula. In addition to the land value I had the building value. I added the building value, I came up with the value of $31,052.39. That is $360.76 an acre, which is 124 percent of $1.50 that I used a while ago. I used it as my base. There was 83 feet average thickness, and 124 percent of $1.50 is $1.86 a foot, and that figured out 154.38 an acre, and 83.70 acres at $154.38 is $12,922.51.

Q. Now, Tract A-107E, that is the Kerkoff. Does that value include the minerals? A. No.

Q. Give the total value including the minerals? A. $75.00 an acre on the minerals, $6377.50.

Q. What is the total diminution? $19,300.01.

Q. That is the total diminution of value on the Guthrie land including the minerals? A. Yes.

Q. Let's go back to the Merz. What is the fair cash market value of the Merz land on March 8, 1956, including the minerals? A. That would be $52,000.00.

Q. And how much less was the fair cash market value on the Merz land by reason of this easement? A. $37,210.88.

Q. The figures you gave before was the surface alone without reference to the minerals? A. Right.

Q. With respect to Tract A-107E, which is 80.10 acres— A. $60,200.00 to the total valuation on the Guthrie land.

Q. How many acres is that? A. 160 acres.

Q. Now, on A-107E, the Kerkoff Tract. The easement covers 80.10 acres in Lot 4, and part of the SW ¼ NW ¼ of section 3, and part of the SE ¼ NE ¼ of Section
159 4, in Township 10 North, of Range 19 W.I.M. Do you know the fair cash market value—what do you have, the 80 or the whole 200 acres? A. I have got it broken down into 200 acres on the land and buildings, and then the minerals separately, and then the total of all of them.

Q. What is the total value of the entire 200 acres owned by Mr. Kerkoff in that tract? A. Everything?

Q. Yes. A. *$35.950.00.*

Q. Do you think its value was decreased by this easement which was 69 feet high on the south line and 164 feet high on the north line? Do you think the value is decreased? A. It is a different figure now?

Q. It is 69 feet on the south line to 164 feet on the north line, that is correct. A. 69 feet to 164 feet. My figures would be incorrect on those.. I based it on my formula then, I had 80 feet and 135 feet, which gives an average of 116 ½ feet. I can figure that other in just a minute here. The average is the same.

Q. The average is the same, so therefore your value would be the same? A. Yes, the formula works out there.

Q. What is the difference in the fair market value by the imposition of this easement? A. $12,767.20.

Q. How did you arrive at that figure? A. 83 ½ feet is the average thicknes of the affected area, and the land value of the affected land is $7,850.00, there was $7,300.00 worth of buildings, making a total of $16,150.00. That is an average of $202.00 per acre on the affected land, which is 67 ⅓rd percent of the $300.00, or $1.01 a foot. 83 ½ foot

thickness at $1.01 a foot is $84.34 an acre, which makes $6,767.20 on the 80 acres affected. The minerals at $75.00 an acre. I used the full damage on the minerals on that because of the location points of the probable spacing, the ceiling would be below 135 feet.

160 Q. That is all of it at the north end, the Merz, Guthrie and Kerkoff. At the south end, Tract A-118E, we refer to that as the Davis land. I think we will skip that, we have three Davis tracts and we will come back to that if it is alright with you. The Smith Tract, A-119E, which is 138.73 acres in the *SW"* SW ¼, NE ¼ SW ¼, and all that part of the NW ¼ SW ¼ and the S ½ SW ¼ NW ¼, of Section 27, Township 10 North, of Range 19, in which the easement is 81 feet on the north line to 145 feet on the south line.

Do you know the fair cash market value of the 140 acres owned by Mr. Smith? A. $45,500.00, that is everything.

Q. That was the fair cash market value on March 8, 1956, is that correct? A. Yes.

Q. Did the imposition of this easement as I have outlined in your opinion decrease the fair cash market value of this property? A. Yes, sir.

Q. How much? A. $26,147.67.

Q. That includes everything? A. Yes, sir.

Q. Tell the Commission how you arrived at that diminution in value? A. The land and the buildings made a total of $33,736.75, for an average of $243.00 an acre. The average thickness of the affected air was 87 feet. $243.00 is 81 percent of $300.00, or $1.22 a foot, or 87 feet is $106.14 per acre. 138.73 acres at $106.14 per acre is $14,735.42. When I looked at this there was originally, it was my understanding there was to be a shelterbelt destroyed, which I figured at $1,000.00. Then 138.73 acres of minerals at $75.00 per acre, $10,412.25, making a total of $26,147.67.

Q. As to Tract A-122E, which is referred to as the Rogers Tract. It is 11.52 acres in the W ½ W ½ SE ¼ of Section 27, Township 10 North, Range 19 W.I.M. What was the fair cash market value of the 160 acres owned by these people on March 8, 1956? A. $55,000.00.

161 Q. Do you think the imposition of this easement on the 11.52 acres decreased the fair cash market value of that property? A. Yes, sir.

Q. How much? A. $1,295.60.

Q. What basis did you have for arriving at that valuation? A. I figured the land value at $250.00 an acre, or 11.52 acres is $2,880.00, and that figured $92.50 an acre, at 83⅓rd percent of $300.00, and the average thickness of the affected air was 74 feet, and that made it $92.50 an acre. 11.52 acres at $92.50 an acre is $1,052.00. And in this particular instance I gave the value of those minerals a value of $20.00 an acre. They were originally figured at $75.00 an acre. An oil company going in there to drill on that would have to do a lot of extra surveying in determining how you could get in there on that, so I figured $230.00, making a total of $1,295.60.

Q. Now, A-124E, the Hoover tract, which is 40 acres, which is 40 acres in the SE ¼ of the SW ¼ of Section 27, Township 10 North, of Range 19, which is a part of the 160 acre tract. What, in your opinion, was the fair cash market value of this 160 acres on March 8, 1956? A. I didn't value the tract, it was outside the area, it was across the road. I valued this 40 acres in the affected area.

Q. How much was the fair cash market value of this affected area? A. $13,000.00.

Q. Do you think this decreased its fair market value? A. Yes, $6,775.20.

Q. Tell the Court how you arrived at that figure? A. Surface value on that was $250.00 an acre, which is 83⅓rd percent of the $300.00, or $1.25 a foot, there were 75½ feet affected, which made a total of $94.38, or $94.38 an acre, and 40 acres at $94.38 is $3,775.20. In this case the average thickness of the air was 75 feet, so I re-
162 duced the mineral damage 100 percent, or $3,000.00, making a total of $6,775.20.

Q. With regard to Tract A-118E, Davis, 50.25 acres, there was an easement imposed as of March 8, 1956, running from 32 feet on the north line to 85 feet on the south line, that is part of a 60 acre tract. Tract A-142 is a fee taking on March 4, 1957, affecting 15.49 acres; Tract A-142E is an imposition of a stricter easement on practically all of the remainder of the property, 43.63 acres. 17 feet on the north side, 42 feet on the south side. There are three takings involved in the taking of this 60 acre tract. Do you think you know the fair cash market value of this property on

March 8, 1956, and the fair cash market value of the property on March 4, 1957? Was it the same? A. Yes, sir.

Q. In other words the net result of these three takings is the taking of this 15.49 acres in fee, and the imposition of an easement 17 feet on the north side to 42 feet on the south side on 43.63 acres, which is practically the rest of the land. What do you think the value of this property was on March 8, 1956 of the 60 acres? A. $23,130.00.

Q. You testified that its fair cash market value on March 4, 1957 was the same figure, is that right, without regard to any easements? A. That is right.

Q. What was the fair cash market value on March 4, 1957 of the 15.49 acres that was taken in fee? A. Including a dwelling $6,768.75.

Q. That includes the minerals and improvements? A. $6,768.75.

Q. What do you think the fair cash market value was of the remainder of that tract after this 15.49 acres was carved out? A. $16,361.00.

Q. Do you think the imposition of this easement of 17 feet on the north side to 42 feet on the south side
163 decreased the fair cash market value of the remainder of that tract? A. Yes.

Q. How much? A. $14,430.62.

Q. Your testimony is that the fee taking was $6,868.75, and the easement taking was how much additional? A. $14,430.62.

Q. Tell the Court how you arrived at that $14,430.62? A. This little tract was where I started in on and got my basis of all of this figuring. I figured that little tract of land which is in a little sort of a swell, pretty fertile piece of land, at $300.00 an acre. The average thickness of the affected air over that is 170 ½ feet, and since $300.00 is the basic figure, or $1.50 a foot, that figures $255.75 an acre, on the 43.63 acres is $11,158.37.

There is only 29 ½ feet of free clearance on this land, so the minerals I figured at $75.00 an acre total loss. $3,272.25.

Q. Now, with regard to Tract A-123E, 7.99 acres in the E ½ E ½ SE ¼ of Section 28, Township 10 North, of Range 19; Larry, in connection with this tract we are concerned only with the damage imposed by an easement of 125 feet on the north line to 145 feet on the south line, inso-

far as that affects an undivided one-half of the minerals under that 8 acres. A. Alright, that piece of land involved is a long narror sliver, and the ceiling up there is relatively high up there, but it still comes in within the maximum height of drilling rigs. So anybody going in there would have to be sure of two things: They would have to know that they were free from out from under that ceiling, and also in the right place. Minerals probably could be drilled out, but because of the difficulties there in determining where they are, there is a minor damage there and difficulty, and I figured about $20.00 an acre damage, or about $160.00.

Q. That is all.

164 Mr. Camp: First, we would move to strike this witness's testimony as it affects the mineral values, as there was no basis at all shown to show that he is qualified as an expert to express an opinion as to the value of minerals in this area; no qualifications whatever has been stated.

Mr. Whiteside: Overruled.

Cross Examination by Mr. Camp:

Q. Mr. Willcox, starting with Tract 104E, did you compare it with the land on 118E? A. When you say did I compare it, I didn't compare it by other than just relative comparison values.

Q. How did you compare it? Have you ever been on Tract 104E? A. Yes, sir.

Q. On what portion of it? A. All over it.

Q. When was that? A. Well, the last time was this morning.

Q. When was the first time, sir? A. February 5, 1958.

Q. Then you were not familiar with this land at the time this lawsuit was filed, were you? A. Not other than that, not other than my general knowledge of the area.

Q. What specifically were you familiar with in this area? A. Well, back in 1935 the company I worked with actually owned a tract of land, it would be a mile west and on the south side of the road.

Q. One mile west and on the south side of the road in 1935? A. Yes, sir.

Q. What else were you familiar with? Were you familiar with that tract of land, or did the company just own it? A. I was familiar with it, I took it.

165 Q. You foreclosed a mortgage on those landowners? A. No, I think I got a deed on that land.

Q. What else were you on and familiar with since 1935? A. On the other side of the highway, there on the east side of the highway, I made three pretty high loans in 1945, and made a survey of about 6 to 10 miles square in that area to justify those loans.

Q. Did they include the property in this lawsuit? A. Well, I don't remember that. They didn't include this particular party's tract I am quite sure, but they were checkerboarded in that area there. Then not more than two or three years ago I looked at a bunch of takings and easements on the east side of this base.

Q. When was that? A. Two or three years ago.

Q. Was that after the action was started? A. On these tracts?

Q. Yes. A. No, before. I think it was before—I was trying to recall whether it was two or three years ago. It was several tracts of land, I should have said on the base.

Q. What did you do in connection with those tracts? A. I testified as to their values.

Q. What did you do in way of inspecting them? A. Went all over them.

Q. Did you walk all over them? A. I wouldn't say I walked all over them, I don't have to walk every foot of them.

Q. What did you do? A. My routine in—do you want to know what I do when I start making an appraisal of a tract of land?

166 Q. What did you do in these? A. I did the same thing I do in a routine appraisal of land.

Q. Tell us what you did in this case? A. The first thing I do is start in some five or six miles from the tract of land involved, and in driving to the tract that is involved I am watching buildings, cultivated areas, crop conditions, the general character of the country, the soil types, and the topography. Then as I get to the tract of land involved, which I usually have located on a map, I start in usually at

the first corner I come to, but I try to drive around the whole tract of land first to get an overall picture of it. Then I start in making a detailed inspection. Sometimes it just happens the buildings are, you might say, in the way first, and I would check the buildings, and then wherever I can drive without walking I drive. I learned 30 years ago or 40 to save steps when I could. Then if there is some area I can't drive to and I need to get over there to see it I walk to it.

Q. Getting back to the question, in 1956 or 1957 on the tracts on the west side, what did you do there? A. I made an appraisal.

Q. Did you drive around over them, or walk around over them? A. I did all of it.

Q. Where is that land located? A. Have you got a map here that give you the section numbers?

Q. Yes. A. I remember one of them because it belonged to Tony Greteman, that is the tract of land that I had taken title to one time. It was the West Half of the SW ¼ of 9, Southeast Quarter of Five (5). I don't remember the other one now, there was another one in there.

Q. Was that all the land you were on at that time, in 1956 or 1957, is those two tracts that you have talked about in Section 9 and Section 5? A. I didn't get the question.

167 Q. What other land were you on at that time? A. I drove around and drove over several tracts just to get some comparative values.

Q. What tracts, sir? A. Well, I was on the whole South Half of 16, I was on the Northeast of 17, I have been on the Northeast of the Southeast of 11. That is all I can think of off-hand. I may have had others, and I may not have.

Q. Is that all the tracts that you have been on in this county since 1935? A. No. You say in the county?

Q. In the area, right around here that we are concerned with in this county, say six (6) miles either way? A. Oh, no. Six miles either way, I have been on the east Half (E ½) of 24, whole East Half of 25, Northwest Quarter of 31 down in the same township. I have been on land in 23, or in the next township west, and I have been up in 9 on the next township east. I have been on 10 in the next town-

ship south, 25 and 30 southwest of the tract there, it is in the township south and in the township south and west; 33 in the township south of that.

Q. When were these times? What was the occasion of being on these properties? A. Well, making appraisals for loans.

Q. Between 1935 and 1945? A. No, between 1945 and now.

Q. Which of those were you on since 1954 and 1955? A. Well, here is one I haven't named yet, 31 in 9-19. I can't give you the dates on them. I could get records out of my office and give you the exact dates on all of them, but I don't have them here, and I just couldn't give you the dates of them.

Q. Do you have any idea of what tracts of land you have been on since 1954 in this area? A. Yes, I
168 have been on all of those, all of these down this west side here since 1954.

Q. West side of what? A. This Clinton Air Base, land in 8 and 9, 16 and 17, 20 and 21, 22, 23, 11, and I have been on land in 18, 19 and 30 over here on the east side. I have been on some land up here south of Foss, but I can't remember the description of it.

Q. Did you go on any particular lands and study any particular lands in connection with this appraisal? A. Yes, sir.

Q. Which lands? A. The land in 104E, 106E, 107E, 119E, 122E, 123E, 124E, 118E, 142 and 142E, all of those.

Q. Is that all you went on in connection with this appraisal? A. No.

Q. What lands did you go on and inspect in connection with this appraisal? A. Well, I have been on the Northeast of 27, the Southwest and the West Half of 21, the West Half of the West Half of 16, *The* Southeast of 16, the West Half of the Southwest of 9, Northwest a strip in the Northwest of 22, Northeast of 28, Southeast of 28, Southeast and East Half and Southwest of 4, and the Southeast of 5, all of those are in 10-19.

Q. Is it your testimony that you went out on these lands and viewed them physically? A. Yes, sir.

Q. Including the Merz land? A. Yes.

Q. Would you tell this Commission how the Merz land

was divided up on March 8, 1956? A. How do you mean divided up?

169 Q. Was it pasture land, or was it farm land? A. There was approximately 100—about 120 acres apparently in cultivation at that time.

Q. Where did that land lie? A. That land laid along the west side of the tract and the south side, there was a low strip—a little rough land up through it sort of the middle of the tract, and then the old building headquarters were down in the southeast corner, and that was not in cultivation.

Q. What, if anything, was he farming the land in at that time? A. Standard crop rotation of cotton and wheat, and grain sorghum.

Q. Did he have any wheat on it at that time? A. Not when I looked at it.

Q. When did you look at it? A. About a year after the taking.

Q. That is the first time you ever saw that land to go out on it, wasn't it? A. Yes.

Q. He can still grow cotton on that land, can't he? A. Yes.

Q. Still grow wheat on it as well as he ever could? A. Yes.

Q. He can still grow everything on it that he could always grow on it, can't he? A. No.

Q. What couldn't he grow on it? A. Atlas Sargo.

Q. Where? A. Along the south side.

Q. How tall does that Sargo get? A. I have seen it 18 feet.

170 Q. Sir, we are not talking about irrigated fertilized land, we are talking about this sandy land. A. That is pretty good row crop land out there.

Q. He doesn't grow Atlas Sargo, does he? A. I haven't seen any on there, but that is a limitation on the land.

Q. That is the only thing you can think of this man couldn't grow that he could before, isn't it? A. Of course, they are getting to be quite a little bit out here in this country of timber farming even, and you couldn't grow any of that, or shelter belts. Shelter belts are pretty important, or were in the thirties.

Q. There is not any on this land, is there? A. No, sir, and there can't be.

Q. In connection with all of these tracts of land that you were on, did you make loans, or what was your purpose in going on those tracts? A. These that I testified to?

Q. Yes. No, I was looking at them for the purpose of determining the damage to them.

Q. Let's take the land in Section 27? A. Which part of 27?

Q. The part you said you were on, which part was it? A. I was on the North Half of the Northeast, and most of the South Half.

Q. You were on which portions? A. The North Half of the Northeast, and most of the South Half. No, none of that was for making loans.

Q. On this North Half of the Northeast? A. I was just using that as a comparison, it had been a recent sale.

Q. How did it compare with land in that area, how was it? A. Well, it compared pretty favorable with the
171 top land of the area, but that sale was at such a date that it already would have been affected by the *proximidity* of the base.

Q. What was the date of that sale, sir? A. 1957 is when the deed was recorded, and the deed was dated December 7th, 1956.

Q. December of 1956, and you say this was some of the best land around in the area? A. No, I didn't say that. I said it compared favorably, fairly *favorable* with the best land in the area.

Q. Alright, compared favorably with the best land. Now then, how did it compare with the Merz land? It was better land than the Merz land, wasn't it? A. Yes, sir.

Q. And it sold for $200.00 an acre? A. Yes.

Q. $200.00 an acre even? A. Yes, but that was after the time period occurred where there might be some detrimental effect there, and I would say that that sale price did not have a true value, true market value, true unaffected market value.

Q. What were the improvements on this particular sale we are discussing? A. A little house and barn, and out building or two. I didn't take any particular notes on a

lot of these tracts that I had looked at. For comparison, I was just checking soil type primarily.

Q. What soil type was it? A. Brown sandy loam.

Q. Does it have a name? A. I got my soil training in Illinois, which was based on the color and texture, and as far as the names in recent years that have been put on soils I haven't paid my attention to it. The old system taught at the university was to name the soils by color, texture and formation, and that is the basis I have used ever since.

172 Q. Let me see if I understand you, you say this land compares favorably, and that is better than the Merz tract of land, and this land sold for $200.00 an acre? A. Yes.

Q. Yet I believe you placed a value of $250.00 an acre on the Merz land, isn't that correct? A. Yes, but that value of $250.00 an acre on the Merz land is based on its being set out in a completely remote area, away from this air base.

Q. Run that through again? A. That value of $250.00 an acre is based on the agricultural value of it if it is placed out away from the Air Base.

Q. Mr. Wilcox, you do understand that the question involved here is the value of this land at the place it is at the time we took it? A. Yes.

Q. Considering all the factors involved at that time, this Base has been here since 1942 except for the period it was closed down? A. It was apparently abandoned after the War, and this taking was—it had been announced it was being activated, but it was activated before or about the same time as the taking of the easements, as I get the dates.

Q. But you say the Merz land which was poorer land was worth more money because it was isolated by the Base, or something like that? A. No, I didn't say that the Merz land was isolated by the Base, and I didn't say that either one of them was. I said the other tract was sold, this sale price on that that we are talking about was after, not only the Base had been activated but was being pretty well used, which would have a limiting effect on that tract of land.

Q. But the value of the land on that date had a value, as to why it had a value that is another question. A consequential damage by operation of the Base. We are
173 trying to find out what the value of the land was on that Base. How did the improvements compare to this particular sale with the improvements on the Merz land? A. I didn't have a fair shot of looking at the improvements on the Merz land, because they had already been moved from one corner of it to the other. Between the time of the taking and the time I looked at it the buildings had been moved from the affected area to the unaffected area.

Q. Have you been in the buildings? A. Been in the buildings on the Merz land?

Q. Yes. A. I haven't been in the house, I have been in the other buildings.

Q. You have been in the outbuildings? A. Yes.

Q. Were you in the buildings on this sale we are talking about? A. No.

Q. Did you go on the land on this sale we are talking about? A. I drove around it.

Q. Along the road? A. Yes.

Q. Did you go out on it? A. No, I didn't walk out on it. I had a good clear view of the entire tract from where I was.

Q. For a half of a mile? A. Yes.

Q. You could tell what the soil was like over there, I presume? A. Yes, sir.

Q. In Section 21, I believe you stated you went on some land in Section 21? A. Yes, sir.

Q. What portion of that was that? A. The Southwest Quarter (SW ¼) and the West Half (W ½) of the Southwest Quarter (SW ¼).

174 Q. 240 acres? A. Yes, sir.

Q. Did you go out on that land? A. Yes, sir.

Q. Or did you just drive by it? A. I drove on two sides of it, and then I stopped and walked up the fence on one place on it.

Q. Then you didn't go out on it either? A. No, sir, I didn't go out on it.

Q. But you looked at it? A. Yes.

Q. That is a fine farm, isn't it? A. Well, it is a pretty

good farm, but it has a pretty fine ridge angling from the northwest corner to the northeast.

Q. What kind of soil is that? A. That ridge is sandy.

Q. What kind of soil is the farm? A. Heavy sandy loam.

Q. More productive than the Merz soil, isn't it? A. Part of it is, and part of it isn't.

Q. There isn't any of it that is less productive, is there? A. Yes, sir.

Q. But you didn't go out on it, did you? A. I didn't walk out on it, but I was out enough on it to see what was less productive and what is more productive.

Q. Standing from the road you could tell the portion on 240 acres that was less productive and the portion that was more productive? A. Yes.

Q. How would you say this compared with the Merz land? A. I would say on an average. This tract
175 has 80 acres that is materially better than the Merz land, that it has 80 acres that is about average with the Merz land, that the Merz land has 10 acres that is possibly, or possibly 15 acres that is poorer than anything on this tract, and that the balance of it will average out pretty close.

Q. I believe you said the Merz land has 15 acres that is poorer than any on this particular land? A. Yes.

Q. And the rest of it is comparable except for 80 acres which is much better? A. That is right.

Q. That is the sale you were talking about and it is much better than the Merz land? A. It would average out 80 acres of it better, there is 15 acres on the Merz land that is poorer than it—poorer than any on this tract of land in 21, the rest of the Merz land after you take out about half of that 70 acres will average out about the same.

Q. The 80 acres is much better, the rest of it is about average? A. If you average it out, there is some of that land—there is about 70 acres or 70 acre ridge across the tract of land there that is not as good, about half of it is sorrier than the Merz land—about half of it is sorrier than the average of the Merz land, and if you will take that and average it in with the best land it will average out about the same. It is a different soil type, I will grant you that, but the average—there is 80 acres of better land on this

tract, but there is 70 acres that is not so good and if you will average it in there it will average out about the same.

Q. There is a lot more acres in this 240 acres, this 240 acre tract? A. I am talking about average per acre.

Q. Are you going to change your testimony, that 80 acres is better than anything on the Merz land? A. No.

176 Q. Then we have 15 acres of the Merz land that is poorer than anything on this land? It is Daniels to Walter's land? A. Yes.

Q. Is that right? A. That is right.

Q. Then the remainder? A. 70 acres of the remainder is not as good as the average of the Merz land. Take 15 acres out from the Merz land, and then take 70 out of this land, it is not as good as the average left of the Merz land.

Q. Let me get this straight, 160 acres was what Merz had? A. Yes.

Q. 15 acres is poorer? A. That is right.

Q. There remains 145 acres of Merz land? A. Yes.

Q. We have 240 acres of this other tract? A. Right.

Q. Now, 80 acres of this other tract is better than anything on the Merz land? A. That is right.

Q. And— A. 70 acres is less valuable than the average of the Merz land, the average of the 145 acres of the Merz land.

Q. And the other 90 acres is average with the Merz land? A. Yes.

Q. Considering this unit here, the McDaniels to Walters unit, or the other way around? A. McDaniels to Walters?

Q. 240 acre tract as a whole, then it has a per acre value in excess of that of the Merz land, doesn't it? A. I haven't figured it out on that basis, so I couldn't answer that.

177 Q. Could you figure it out? A. I could with a little time.

Q. I would like to know your opinion on that?

Mr. Whiteside: Let's take a five (5) minute recess, and he can figure that out.

Reporter's Note: At this time there was a five (5) minute recess;

At the expiration of said time all of the parties returned and the following proceedings were had, to-wit:

A. The total value I came up on that 240 acres is

$55,000.00, and that is $228.00 an acre. That is on the basis of my appraisal.

Q. Mr. Wilcox, I am not sure I understood you. You say you valued the 240 acre tract at $55,000.00? A. Yes, sir, that is on the basis of the relative value between that and the Merz tract.

Q. In other words you are using the Merz tract in setting a value on it, and then using the sales and raising what the sales actually sold for to reach what they should have sold for, instead of turning it around in using the sales? A. I don't know what this tract sold for. Revenue Stamps of $22.00, which I estimate it sold for $42,000.00.

Q. It is my information that it did sell for $42,000.00. We are trying to determine the comparable value—

Mr. Meacham: We object to Mr. Camp testifying as to the sale.

Mr. Whiteside: I don't believe it is well taken. If you have evidence to what this land sold for you can put it on later.

178 Mr. Camp: We will put it on later, but so you will know now that will be our proof. It did sell for $42,000.00.

Q. Do you know how many or how much of the minerals were conveyed in that sale? A. No.

Q. Do you know how many of the minerals were conveyed in the sale previous to this that we discussed? A. No.

Q. Did you consider this sale in reaching your opinion the before value of the Merz tract? A. No, I considered the value of this sale in substantiating the value that I put on the Merz tract.

Q. You mean you first went out and reached a value for the Merz tract, and then you looked around for something to back up that opinion? A. Yes, sir.

Q. And you just sort of drove out from Oklahoma City, looked it over and put a value on it, and looked around for something to attach your strings to, is that about it Mr. Wilcox? A. Well no, I have been familiar with the value in this county for something over 20 years, something close to 25 years, and actually from the standpoint of arriving at the value of these tracts of land, between February 5th and the date today, I expect I have driven through

that area and had a question in mind about a specific tract, drive on that tract, and to answer that question and then taking a swing around and check the general appearance of all of them again at least three or four times.

Q. Let me ask you this, you say you handled all of this loan business for your company in the southwest United States, is that correct? A. Yes, sir.

Q. Where is the southwest United States geographically? A. Specifically the southwest United States
179 that I have been most active in is Oklahoma, Kansas, New Mexico, and a few years back went over into Arizona and western Arkansas, northwest Louisiana, southwest Missouri. A few years before that I was operating throughout the entire south.

Q. You are telling the way you reached your value on the Merz tract was that you came and put your value on it, and then checked the sales to substantiate your value? A. Over a period of years, or at least I have gotten to know how to arrive at a value on a tract of land based on its topography, soil type, general appearance, and utilization on it.

Q. Does the value of the same land vary from community to community from Louisiana to here? A. Yes, on sale price, and lots of times inside the same county.

Q. Then you deem of importance to check the locality, within the immediate community, to find out what sales are being transacted and what the market really is, and not what you think it should be? A. That is right; that is the reason I checked these other sales.

Q. To see if it was what you thought it should be? A. That is right, if it would have been too far different, and in fact I did change some of them.

Q. Would you explain to the Commission how you reached $40,000.00 for this 160 acre farm using the $42,000.00 sale for the 240 acre farm which had some better land on it? A. Counting the little tract, the two little tracts of inferior land, I just averaged that tract across at $250.00 an acre, and on this other tract I valued 80 acres at $275.00, 90 acres at $250.00, and 70 acres—the 70 acre ridge there at $150.00.

Q. On which tract? A. That is on this 240.

180 Q. I believe according to our calculations you placed a $325.00 per acre value on the Merz tract?

A. No, sir; it was with minerals. That is where you separate the minerals from it.

Q. That is what we are interested in, what it was worth for the whole thing before? A. When you separate the minerals from the tract of land, the minerals then take an entity, and take an increased value.

Q. Were they separated here? A. That is my *understand*, they are separated.

Q. And you are basing this value on Merz not owning the minerals, is that right? Someone else owning the minerals? A. I am basing it on the minerals taking a separate category. Where minerals are not worth anything nothing is ever said about mineral value, but where a tract of land has the minerals or rather is in an area where minerals are of some value, as a general rule if they are taken as a separate category under a sale. So many of them are reserved. You practically can't move a piece of land in Oklahoma any more and expect to get the minerals on it, all of the minerals on it, unless they are in a completely pumped out area, or proven area.

Q. Let's discuss this particular tract here, we will confine our testimony to it. Your testimony to the Commission is that the total interest in the Merz tract before the imposition of any easement by the government was $325.00 per acre? A. That is the two separate entities.

Q. Are you testifying that you are breaking these down into units and pieces, and going to put them together to get the whole? A. That is right.

Q. Is that what you understand, that is the way you are attempting to do this? A. Yes.

Q. Would that value exceed the whole? A. I don't know the mineral value, or how many minerals were involved, I should say on this 240 acres, but what minerals went with it or were gone from it, one way or the other, would enter into the same picture.

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Q. Would you answer the question. A. Would you repeat it again.

Q. Do the pieces add up more than the whole in your theory? A. No, they add up the total.

Q. Alright, then this $325.00 per acre is your total per acre of the Merz farm, including everything? A. That is right.

Q. That makes the total value of the Merz farm of $52,000.00, doesn't it? A. Yes, sir.

Q. Not $40,000.00? A. No.

Q. It is also your testimony, isn't it, that on the two sales that we have discussed that you didn't inquire as to the amount of minerals that were exchanged along with the fee, or the surface? A. That is right.

Q. Moving to Section 16. I believe you examined some property there? A. Yes, sir.

Q. And what property was that? A. The West Half (W ½) of the Northwest (NW ¼), that W ½ of the Northwest (NW) tied in with the W½ of the SW of 9, as one unit. That is J. G. Francis to Samuel Spradlin.

Q. When was that sale? A. September of 1958.

Q. September of 1958? A. Yes, that is the date that I have. It was recorded December 1, 1958.

Q. Which section are we testifying about? A. The W ½ of the SW of 9, and the W ½ of the NW of 16, that is one sale.

182 Q. In 1958? A. Right.

Q. What was the sale price there? A. $38,500.00.

Q. For how many acres? A. About 145.

Q. About 145? A. Wait a minute, 160 acres less 25 acres, 135 acres.

Q. And what does that figure out, about $225.25 an acre for that land? I mean about $280.00 an acre? A. $285.00 an acre.

Q. How much was that figure? A. $285.00 an acre.

Q. What kind of improvements did it have on it? A. Pretty fair house and barn.

Q. How did that compare with the Merz property? A. A lot better, but there was an easement on that to the government.

Q. How was the land, how did it compare, the soil? A. Some of it was comparable, some was a little better, but it had an easement on it.

Q. The soil was *quit* a bit better? As a matter of fact that is about the best land around the Base right there, isn't it? A. No, I wouldn't say that. It compares with the best favorably, but I wouldn't say it is the best.

Q. It is as good as the best, isn't it? A. No, sir.

Q. Which land is better? A. We have got a little old tract that is involved that is better.

Q. Which tract is that? A. That Davis land.

Q. There where you can't even farm all of it? A. Yes, what you can farm is really good land. That is a
183 little old pocket of land down there that will really produce.

Q. Crops or sand? A. Crops. There wasn't too much evidence of sand around there when I was there.

Q. For agricultural value this sale we are discussing, all of the land is superior to that land on the Merz farm, isn't it? A. No, along the west, or east side of it there, which may have, I think probably was occasioned by the fence of the place there, there is an awful lot of sand damage on it, and that was there when this sale occurred.

Q. What kind of easement does this land have on it? A. Safety easement. You can't gather over 25 people in there, and you can't—it has been a long time since I read that thing. It seems to me that it restricts it to putting any buildings on it, restricted on the height factor also, and you can't use it for certain types of operation. I have forgotten now.

Q. You don't know what that easement is that is on there, do you? A. Yes.

Q. Then tell me what it is? So far you haven't. A. Well, that is it.

Q. What height limitation is on it? A. I don't know, it has been three years ago since I read the easement.

Q. Right now do you know what it is? A. Generally, but not specifically.

Q. Does it affect the land adversely as a clearance easement? A. More so, that is my opinion.

Q. This land with a safety easement on it, did you go on the land? A. I didn't today.

184 Q. You drove down the road and took a look at it through the windshield? A. I was on this land three years ago.

Q. Out past the fence? A. Yes, I was all over that.

Q. If you compared that land and it is much better land than the Merz land, how about the improvements? How do they compare dollarwise? A. Frankly, just about as if you had improvements on one and didn't on the other.

Q. In other words the improvements on the sale we are talking about could add $8,000.00 or $10,000.00 on the value

of the land, couldn't they? A. Just about $8,000.00 I would say, maybe *$10.000.00.*

Q. So that would reduce the land value down to about $210.00 an acre, wouldn't it, for the land without the improvements? A. Well, something like that; $225.00.

Q. So that would make the land value on it somewhere around $210.00 to $225.00, where you put the land value on the Merz tract with the minerals of course, both of them, discounting the improvements for $325.00? A. This is with a restrictive easement on it, and the other is without a restrictive easement on it.

Q. How much of this area is affected by the restrictive easement? A. About half of it.

Q. So there is only a portion of it that has this easement on it? A. That is right, it is on part of it, but that gets you down to where the rest of it is an uneconomic unit.

Q. Can't you still grow cotton on this? A. Not profitable.

Q. Why? A. You can put a little cotton on it, there may be a question whether you get it off or not.

185 Q. Why? A. Because on this type of easement you might have to catch a dry day in between the weather and get a swarm of Mexicans in there to gather that cotton, you can't get enough in there to get it out in one day.

Q. The 135 acres, how much is the cotton allotment? A. As I recall the cotton allotment was 80 some acres.

Q. Only a portion of that 80 acres is in the safety area? A. Part of it.

Q. You could always have as many as 25 cotton pickers out there at one time? A. If the weather was right. You could have them out there on a rainy day, but they couldn't pick cotton.

Q. We are talking about the usefulness of the land, you say it is destroyed? A. I didn't say it was 100 percent destroyed.

Q. Do you know whether the minerals were sold with this land or not? A. There were some minerals retained, and I don't remember how much.

Q. Did you go by that this morning? A. Yes, sir.

Q. That same tract? A. Yes.

Q. Did you look at it? A. Sure.

Q. You saw cotton out there all over it, didn't you? A. Pretty good cotton, yes.

Q. Hasn't affected the planting of cotton on it, has it? A. I didn't say it affected the planting of it, I said it might affect the gathering of it.

Q. How does the soil compare with the Merz tract for the growing of the cotton? Is it as good or better? A. Some of the Merz land will grow just as good of cotton as there is on this tract of land. You know, the operation of the two tracts are not alike, and that isn't the fault of the land.

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Q. Let's go to the other portion of Section 16 that you say you checked. I believe you say you checked the Southeast Quarter, is that correct? A. Yes, sir.

Q. When did you inspect that land? A. I was by it this morning too.

Q. When did you first inspect it? A. The first time I looked at that tract of land was about three years ago.

Q. Did you go out on it at that time? A. Yes, sir, and today I just drove by it.

Q. Did you physically walk around over it the other time you were here? A. I don't remember whether I walked or whether I drove over it, but I was on the tract of land.

Q. Did it sell recently? A. 1956. That is it was dated in the fall of 1956, but it wasn't recorded until the late summer of 1957.

Q. So it was very near in time approximately to the taking of this Merz easement, wasn't it? A. That is right.

Q. Did you find that that land that sold for about $188.75 per acre? A. Plus another hundred, not quite $100.00, about $75.00.

Q. $218.75? A. That is better.

Q. $30.00 more than what I said instead of $100.00. $218.75 is on that sale. Is that what you found to be true? A. $35,000.00 is what I found that apparently was the sale price which was in the deed.

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Q. Did you make any effort to ascertain what the sale price was on any of these sales that you are testifying about? A. The records in the county.

Q. You didn't check with the buyer or seller, or anyone that might have knowledge of it? A. You know, I have done that so often that I would just as soon rely upon my own checking and information as to what somebody else tells me.

Q. Did you contact the buyer or seller on any of these? A. No, I did run into the owner on this tract we talked about just ahead of this, I ran into Mr. Francis in a restaurant somewhere, and I don't remember where it was, and he told me what he had gotten for this tract of land.

Q. This tract of land that we are testifying to right now, how does it compare in soil with the Merz property? A. Some of it better, and some of it average.

Q. From equal to better than average, is that right? A. Well, relatively.

Q. And have you gone on this property which sold for $218.75 an acre, and how were you able to ascertain that the Merz property was worth $325.00 an acre? A. This figure again, I think is without very many minerals involved, that is the way it was reported to me. There were minerals retained, how many I don't know.

Q. Then you didn't make any investigation to ascertain the fact that all of the minerals were sold with this? A. No.

Q. Didn't have improvements on it? A. It had some improvements, yes.

Q. Would you describe the improvements, please? A. A fair house, and just fair out buildings, not enough
188 to amount to anything. Some of them had been removed since I was there three years ago.

Q. Do you know whether it had the improvements on it at the time of the sale? A. No, I do not.

Q. Going to Section 28. What property did you inspect there? A. The Northeast Quarter (NE ¼), and the Southeast Quarter (SE ¼).

Q. Did the Northeast Quarter (NE ¼) sell? A. That is the way it was reported.

Q. When? A. July 2nd, in 1957.

Q. Who bought that land? A. Glenn O. McDonald, according to the records.

Mr. Meacham: You are talking about the Southeast (SE) or the Northeast (NE)?

Mr. Camp: He says Northeast (NE).

The Witness: It slipped here, the Northeast (NE) was John Hoffman to Schenberger.

Q. When was this sale? A. July 2, 1957, recorded August 19, 1957.

Q. For how many dollars? A. $31,000.00.

Q. That is for 160 acres? A. Yes, sir.

Q. That figures out a little less than $200.00 an acre? A. Less than $200.00 an acre land.

Q. Is it similar to other land in that area? A. It is similar to other land in that area when you go west and south from this tract of land, but it isn't similar to land east and north.

189 Q. What is the difference? A. This is very sandy. The north 100 acres of it has probably 40 or 50 acres of it that is comparable to land in this area, and then it gets sandy fast.

Q. Are you testifying it is a different type of land than the Davis land? A. Yes.

Q. Different type of land than the land to the south of it, the quarter to the south? A. Well, the quarter to the south of it is not different than the quarter—it starts changing on this Northeast Quarter and gradually getting sandier and more rolling in the quarter south of it, and the half section west of it.

Q. So it is your testimony that this is better land than the land straight to the south, is that correct? A. That is correct. The Northeast Quarter is not better than the Southeast Quarter.

Q. Was it improved? A. Frankly, I don't remember.

Q. Do you know whether any minerals went with it or not? A. No, sir.

Q. How does it compare with the Merz land? A. It is not as good.

Q. Not as good of land? A. No, sir.

Q. Is the Merz land twice as good as it? A. No, sir.

Q. Well, it is almost as good as the Merz land? A. Is this almost as good as the Merz land?

Q. Yes. A. On the surface I would say that it was probably 75 percent as the Merz land.

Q. On the surface. Why do you say on the surface? A. Because the minerals was just the same.

190 Q. And so if it was ¾ths as good as the Merz land, and he bought it for approximately $195.00 per acre, how do you arrive at the value of $325.00 per acre for the Merz land? A. $250.00 on the surface, $75.00 for the minerals; and if the minerals are added to this it would

push it up to probably—I don't know the mineral situation on this tract.

Q. What do you mean? You don't know whether they sold or not? A. That is right.

Q. You don't know whether it had any improvements or not? A. I don't recall, I drove by it and was principally interested in the land.

Q. Let's go to the Southeast Quarter of 28. Tell me about that land? A. Pretty sandy piece of land there.

Q. What kind of improvements did it have? A. I don't remember the improvements either.

Q. Do you know whether it has any? A. I did at the time I looked at it, but I didn't make any notes on it.

Q. Do you know whether or not that land is irrigated? A. No.

Q. Have you ever been out on that land? A. I drove by it.

Q. Took a good look at it through the windshield? A. Yes. I didn't pay too much attention to that because it wasn't comparable to anything that was involved.

Q. Do you know whether or not that land sold for $134.34 an acre? A. I know it sold for $21,500.00.

Q. I believe that is what that figures out. Do you know whether any of the minerals went with it or not? A. No, sir.

191 Q. Do you know whether the sale was in April of 1955, or not? A. That is the information on the records.

Q. You say you discounted this sale altogether in arriving at your value? A. No, I didn't say I discounted it. I didn't pay too much attention to it because it wasn't comparable in any way.

Q. Not comparable in any way? A. No.

Q. I believe that you said that you checked some sales in Section 28. A. We covered that.

Q. On Section 4. Did you check some sales there? A. I checked a sale.

Q. Where was that sale located? A. Southeast Quarter of it, and the East Half of the Southwest Quarter.

Q. That sale is adjacent to the Merz tract, isn't it? A. Yes, sir.

Q. And did you determine that that sale sold for $135.41

per acre, or $32,500.00 for the total? A. Aren't you mixed up on that, your figures don't jibe.

240 acre farm. What figures do you have? A. Well, evidently I had a typographical error on mine, because my Revenue Stamps and the amount don't jibe. I think $32,000.00 is correct.

Q. $32,500.00 or $135.41 per acre on the land adjacent to the Merz tract? A. I think so.

Q. In February of 1954? A. Right.

Q. Did you inspect that tract? A. Yes, sir.

Q. Windshield inspection, or did you walk on it? A. I drove on it a little.

192 Q. You drove around on it a little bit, in the field or pasture? A. I couldn't get in the pasture, I had a low hung automobile. The pasture was pretty rough.

Q. You drove around his field? A. Yes.

Q. Was there anything planted out there? A. Some cotton on it.

Q. You drove around on the cotton? A. I didn't drive on his cotton. I drove around the edges of it. You could see across most of that tract, there was about 60 acres of pretty rough land in pasture, and the rest of it was pretty fair land. The *dephth* of the soil is thinning out materially thinner on that tract, just on the width of the road than on the other tracts.

Q. Do you know what improvements it had? A. Not too much, they are better than the Merz tract, but a small house and a small set of buildings.

Q. Barn, chicken house and granary? A. Yes, small but good.

Q. In better shape than the Merz improvements? A. Yes, and painted.

Q. How many acres in cultivation on that tract? A. I estimated that there were in the neighborhood of 165 or 170.

Q. Did you make any effort to determine the amount in cultivation by checking with the soil people, or the government agencies, or the landowner, or go out and measure it, or anything? A. No, sir.

Q. How does the farm land compare with the farm land on the Merz tract? A. It is all thinner, and it has got a lot of rougher land on it. The *dephth* of the soil is not as

great as it is on the Merz tract.

193 Q. Did you make some core samplings out there to come up by the *depth* of the soil? A. You can tell by the color of it.

Q. You mean it changes kind of soil as it changes color? A. Yes.

Q. What type of soil was this? A. This was a soil that was approaching a clay loam, silty clay loam with sand content in it, and rather thin in *depth*.

Q. Is this one of the sales you considered in substantiating your $325.00 figure on Merz? A. I didn't think this farm was particularly comparable to the Merz on account of the difference in the sale.

Q. So you didn't consider it, is that correct? A. I considered it, but not with respect to the sale price.

Q. What did you consider it for then, that is what we were interested in? A. I was looking for comparable soil types, sales that were comparable in there—in their general appearance and production.

Q. What about Section 5. Did you check it? A. Southeast Quarter.

Q. Going back to this last sale, do you know whether all of the minerals sold or not? A. No.

Q. Would it make any difference to you in your valuations if you knew that fact? A. Well, if they all went with it it would make a little difference, yes.

Q. If that land sold for $135.00 an acre, and the minerals were worth $75.00 an acre, it didn't leave much for the surface, did it? A. No, sir; if you figure it that way, which isn't a fair way.

194 Q. That is what you say the minerals were worth, don't you? A. I think they are a separate entity.

Q. Now then, going to the Southeast Quarter of Section 5. Did you check that sale and ascertain that it sold for $125.00 per acre, or $20,000.00 for the quarter, on October 12, 1955? A. Less four and one-half (4½) acres.

Q. Less four and one-half (4½) acres. Where is that 4½ acres, sir? A. I don't know, I didn't check it.

Q. What do you mean less 4½ acres? A. Southeast Quarter less 4½ acres is what the deed called for.

Q. Do you know whether the minerals went with it or not? A. No, sir.

Q. Do you consider $125.00 per acre, and if $75.00 were paid for the minerals, that would't leave out $50.00 for the surface, would it? A. It wasn't much of a tract of land.

Q. Do you consider the minerals more valuable than the surface on that tract of land? A. No, that would sell about equally.

Q. How much difference do you think it would sell for? A. I don't think there would be much difference.

Q. Did it have any improvements on it? A. A little over seven (7) buildings.

Q. What kind? A. I didn't go in, because there was a lot of activity around there, and I kinda don't like to horn in where there is a bunch of people.

Q. Do you know whether it had about a two story frame building on it, with rooms upstairs, downstairs, and recently remodeled, new concrete block cattle barn? A. Pretty good sized buildings there. They were better than what the Merz are at the present.

195 Q. You stated several times that you didn't know what Merz' looked like because you weren't out there and didn't come in this suit until a couple of years after it was started. I will hand you Government's Exhibits 1, 2, 3 and 4, and tell you that those have previously been identified by the Merz Brothers as those buildings as they looked at that time. Does that help you? A. Yes. They don't look as good as they did then, or else this was a pretty good photographer and he did a better job of picture taking.

* * * * *

L. A. WILLCOX, recalled as a witness, having been heretofore duly sworn, testified as follows:

Further Cross Examination by Mr. Camp:

Mr. Camp: We have prepared what we have marked here as Government's Exhibit "E", which contains a Township Plat Area of this area with writing on the plat of various figures, which are appraisals, which our appraisers will establish at a later time. The colored area are various tracts which have sold in this vicinity recently with the amounts and a breakdown of those amounts, and we would offer to the Commission at this time so they

could have it as a guide for our testimony as we go along here. We don't have any others with the figures in, we do have other maps which we will give counsel for the landowners.

Mr. Meacham: We have no objection, except as long as we all understand. The figures they have on there will be subject to proof.

Mr. Whiteside: That exhibit will be admitted.

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Q. Are you the same Mr. Willcox that was testifying here at the time the Court recessed? A. I think so.

Q. For the purposes of the record you are, aren't you? A. Yes.

196 Q. As I recall at the time the Court recessed we had just been discussing what is marked Sale 7 on the map, Exhibit E, which is in Section 5? A. Give me the legal description of it, I won't need the map.

Q. It is the Southwest Quarter of Section 5. A. South what?

Q. Southeast, I am sorry. Southeast Quarter of Section 5. I believe you stated that you had examined that property? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And did you find it to have sold on October 12, 1955 for approximately $125.00 an acre? A. Yes, sir.

Q. Or $20,000.00? A. Yes.

Q. There was a slight amount of it, 4½ acres, that wasn't included in that sale? A. Right.

Q. What minerals, if you know, were transferred at that time? A. That I don't know.

Q. Do you know if the buildings had a value of approximately $4,000.00? A. I would say that was a good nominal value.

Q. Would you know whether the value attributed to the land only, without the mineral consideration or without the building consideration, was approximately $85.00 per acre? A. In my opinion that building and mineral value were in that particular sale, whether the minerals were involved or discounted rather heavy, I don't know. I believe it would have sold to pretty close as it would have with the buildings on it.

Q. How did the land compare with the Merz tract? A. Much more rolling, and much thinner. It had various breaks and draws in it.

197 Q. What kind of soil did it have? A. It had a silty clay loam with sand content, with a clay subsoil.

Q. Were they farming it? A. Yes, sir.

Q. With what? A. Row crop and cotton.

Q. Do you have any idea how many acres were in cotton? A. No, sir.

Q. Did you go upon that tract? A. No, I didn't because there was some sort of a congregation going on there, a gathering of people and I didn't want to disturb them.

Q. When was this? A. Yesterday.

Q. After Court? A. No, sir.

Q. And you have never been upon that tract of land either? A. Just by it is all.

Q. Have you studied any soil maps prepared by any governmental agency on that tract of land? A. On this particular tract, no.

Q. Have you on any of those tracts that we have discussed yesterday in your testimony here? A. No, sir.

Q. Have you looked at any of the aerial photographs that the agricultural department has of all of these lands? A. No, sir.

Q. Now then, I believe it would *expeditate* the matter if you could answer yes or no as I go over some sales in this vicincity as to whether or not you considered them. First, would be Sale No. I on the map, which is in the Southeast of Section 2, selling date 6-5-'52, for approximately $218.75 per acre, buildings valued at approximately $10,000.00, half of the minerals reserved, for a land

198 value of only approximately $140.00 an acre. Did you consider that sale? A. No, sir, I didn't know about that sale.

Q. We have previously covered No. 2 in our testimony? A. Yes, sir.

Mr. Tisdal: What was the sale value on No. 2?

Mr. Camp: The total was $35,000.00—I am sorry, $32,500.00. It is the Southeast and the East Half of the Southwest Quarter of Section 4.

Mr. Tisdal: The first one was the sale in 1952?

Mr. Camp: Yes, that one was in Southeast of Section 2. That is there by the highway.

Q. Sale No. 2 is the one to the left of the Merz tract which we discussed yesterday, that was from Simmons to King on February 16, 1954, it sold for approximately $135.41 per acre, no improvements on it, all the minerals were bought, the land value approximately $105.00 for land value only. I believe you said yesterday you didn't consider that? A. That is Section 4, you say?

Q. Yes. A. That is right.

Q. Sale No. 3, dated January 20, 1954, the East Half of the Southwest Quarter of 18? A. When was that sale?

Q. January 20, 1954, for approximately $157.00 per acre with half of the minerals reserved. A. What is the description of that?

Q. East Half of the Southwest of 18. A. I didn't see that.

Q. You didn't check that? A. No.

199 Q. Sale No. 4, the Southwest of 35, down at the bottom of the map? A. I didn't see that one.

Q. That was March 30, 1954 for $162.00 per acre, with buildings of the value of about $3,000.00, and half of the minerals reserved, or only the value to the land about $127.75 per acre. Sale No. 5, being the East Half of the Southwest Quarter Section 20, of November 5, 1955, for approximately $200.00 per acre, with buildings valued at about $500.00; 7/8ths of the minerals being sold with the transaction, or land only value of about $167.50. Did you consider that sale? A. No.

Q. Sale No. 6, being the West Half of the Northeast Quarter, and the East Half of the Northwest Quarter of Section 12 sold on October 7, 1955 for approximately $141.25 per acre, with buildings valued at about $5,000.00, and half of the minerals reserved, and the land value only of $97.50. Did you consider that, sir? A. No.

Q. Sale No. 7, Southeast of Five (5), on October 12, 1955, for $125.00 per acre, about $4,000.00 worth of buildings, one-half of the minerals reserved, or land only value about $85.00 per acre. I believe yesterday you did consider that sale? A. Yes.

Mr. Meacham: If the Court please, I am sure all of you understand that what George says isn't testimony on these sales. It is alright to identify them with your map.

Mr. Camp: These figures will be established by the appraisers, but for the purpose of getting a prospective here, I am getting it at this time.

Q. Sale No. 8, the East Half of the Southwest Quarter of 34, December 12, 1956, $150.00 per acre, buildings about $3,000.00, no minerals transferred, or land value only about $112.50 per acre. Did you consider that sale, sir? A. No, sir.

Q. Sale No. 9 on our map, being the Southeast Quarter of Section 3 of 8-26-'54, August of 1954, $115.62 per acre, with about $4,700.00 worth of improvements, half of the minerals reserved, with land value only $87.50. Did you consider that sale? A. No.

Q. That was the Southeast Quarter of Section 3, that is the tract adjacent to the Merz tract on the east. That is the Spitz.

Mr. Meacham: That is the quarter right east of the Spitz.

Mr. Camp: It is from Spitz to Morrison.

Q. Then sale No. 10 on the map, being the Southwest Quarter and the West Half—West Half—I mean the West Fourth of the Southeast Fourth in 21, selling on June 23, 1955 for approximately $175.00 per acre, with approximately $5,000.00 worth of buildings or improvements, half of the minerals reserved, land only valued at $137.50. I believe yesterday you said you considered that? A. I did.

Q. And Sale No. 11, being the Southeast of 28, also being Tract 123, the tract is just a portion of it, that sold on April 5, 1955 for $134.37 per acre, with 3/16ths of the minerals previously sold, one half minerals reserved, for land value only $119.35. I believe you said you considered that sale yesterday? A. Yes.

Q. Sale No. 12, being the North Half of the Southeast Quarter of 34, on December 30, 1955, for approximately $237.50 per acre, did you consider that sale? A. No.

Q. On Sale No. 13, on the Southeast of Section 33, which is off of the map up there, the little circle, being on June 10, 1952, for approximately $250.00 per acre, with some nice improvements. Did you take that sale into consideration? A. No, sir.

Q. Sale No. 14, being the Southeast of 16, on November

13, 1956, for approximately $218.75 per acre, no improvements, all the minerals transferred, or land only value of $188.75. Did you consider that sale?
201 A. I looked at it, I had it spotted on my map wrong. I was looking and talking about the Southwest Quarter, which was the adjoining quarter. I was checking my map last night and I checked the wrong quarter, or spotted the wrong quarter on that, and I talked about the Southwest Quarter yesterday instead of the Southeast Quarter.

Q. Let's go back. Have you looked at the Southeast Quarter? A. Yes, sir.

Q. Windshield it, or walk out on it? A. Walked out on it.

Q. Did you examine the soil? A. Yes, sir.

Q. Did it have any improvements on it? A. No, sir.

Q. What kind of soil was this? A. It was sandy loam, silty clay base, or the way I like to name it it is a silty clay loam with a sand content.

Q. How did that soil compare with the Merz soil? Much better, wasn't it? A. Generally speaking it was better, except in a few spots on the Merz it was comparable.

Q. Some comparable, most of it better? A. Yes, sir.

Q. That sold for $218.75 per acre with all of the minerals. Would you explain to the Commission how you used that sale in reaching a value of $325.00 per acre for the Merz place? A. I didn't use that particular place specifically, not specifically one place to arrive at the value on the Merz place. I was looking at all of these sales as an overall picture to arrive at my decision on it, on all of the places. I didn't specifically use this place or any specific place that I was looking at.

202 Q. How do you reconcile the fact that you considered this to be a much better place, but still you valued the Merz place at $107.00 an acre more? A. There was a factor in there where minerals are separated makes a difference.

Q. What minerals were separated where, sir? A. In the Merz tract; the minerals are considered, or I was considering them as an entirely separate entity.

Q. Would you please explain to me what market value means to you? A. Sales price, fair sales price between a

willing buyer and a willing seller, where there is no particular forces pushing it one way or the other.

Q. And when you valued this Merz place to the total value at $52,000.00 that is what you had in mind, was it? A. Yes, sir. It is broken down between a mineral buyer and a land buyer.

Q. I will remind you that all of the minerals went with this sale we are speaking of. A. Yes, sir.

Q. Did you know that? A. No, sir.

Q. Sale No. 15, being the North Half of the Northeast Quarter of 27, on December 7, 1956, for a price per acre of approximately $200.00 per acre, improvements about $3,500.00, half of the minerals reserved, or land value only $141.25. I believe you stated yesterday that you did consider that, is that correct? A. Yes, sir.

Mr. Whiteside: Were all of the minerals conveyed in this sale, sale No. 15?

Mr. Camp: Yes; half of the minerals is my information.

Q. Then Sale No. 16, of the 60 acres that Mr. Davis bought, which is the subject of Tract 118E, 142 and 142E of the suit, which he bought on October 16, 1954, for
203 $83.33 per acre, with a building of about $500.00 value, and all of the minerals, or land only value of approximately $45.00. Did you consider that sale, sir? A. No, sir.

Q. Sale No. 17, 134.75 acre strip to the west side of the base, circled in green on the map, selling September 1, 1958 for approximately $285.71 per acre, with about $800.00 or $900.00 worth of improvements, and one-half of the minerals conveyed back by mineral deed, the same as by way of reservation, where land value only was approximately $205.20 an acre. I believe you stated yesterday that you did take that into consideration? A. Identify it where I can follow it.

Q. That is the Francis sale. A. You said $800.00 or $900.00 worth of improvements.

Q. I was mistaken if I said that. I meant $8,000.00 or $9,000.00 worth of improvements. You said yesterday that was a fair value on the buildings, $8,000.00, $9,000.00 or $10,000.00 on the buildings, and that was a fair value? A. Yes.

Q. Sale No. 18, being the south little strip there on the

base, 13.78 acres, Wood to Johnson on February 8, 1957, for approximately $108.45 per acre with no improvements, and all of the minerals were bought, and it was also subject to an eastment on part of it? A. Yes.

Q. Did you consider that one? A. Yes, sir.

Q. Then Sale No. 19, right above it in that little strip of 27.59 acres on March 16, 1957 for approximately $108.73 per acre with no buildings, and all of the minerals subject to an easement. Did you consider that one? A. Yes, sir.

Q. Sale No. 20, being in the Southeast Quarter of Section 8, it is in green up there on the map, sold on July 23, 1958 for approximately $218.75, no improvements, all the minerals went with it, or land only value of about $188.75 per acre. Did you consider that sale? *that sale?* A. No, sir.

Q. Sale No. 21, on February 3, 1958, on the North Half and the Northeast Quarter of 13, on February 13, 1958, for $137.18 with half of the minerals reserved, or land only value at $122.18. Did you consider that sale, sir? A. No.

Q. That sale was by Mr. Askew to Robert E. Davis, the owner of Tracts A-118E, 142, and 142E. Did you know that, sir, or consider that sale? A. No.

Q. Sale No. 22 on the map, being on January 22, 1958, of the West Half of the Northeast Quarter of 8, in green on the map, for $125.00 per acre, no improvements, half of the minerals reserved, or $110.00 approximately for the land only value. Did you consider that? A. No.

Q. Did you consider the sale on the Southwest Quarter, not outlined on the map by tract number, the Southwest Quarter of Section 34, of the next township north, which adjoins Mr. Guthrie, the owner of Tract 106E, and which he purchased on June 3, 1957 for $93.75 per acre, with about $2,000.00 of buildings, and half of the minerals, or land value only of $67.50 per acre. Did you consider that? A. No.

Q. And I believe the other one not on the map, being the Northeast of Section 28, would you look at your map. I believe you testified that you were familiar with that yesterday, is that correct? A. Yes.

Q. Sold on July 2, 1957 for $193.75 per acre with about $1700.00 worth of buildings, and half of the minerals reserved, or $112.00 per acre for the land only. Is that a

fair statement for the buildings? A. How much did you say?

205 Q. Approximately $1,700.00?. A. I would say that is relatively fair, yes.

Mr. Tisdal: That is Guthrie west of the Davis tract, and due west of the Smith tract—northeast of 28?.

Mr. Camp: It adjoins 123E on the north.

Q. How did that place compare in your estimation with the Merz place? A. It wasn't as good.

Q. Do you know how many of the minerals went with it? A. No, sir.

Q. Were you out on it? A. I wouldn't say that I walked on it, I was out on it, drove down one side of it, in addition to the roads.

Q. Mr. Wilcox, you correct me if my recollection is wrong but it is my recollection that so far you haven't, or you have testified that you were not familiar with the minerals, how many of the minerals were sold or reserved with these few sales which you were familiar with, that you didn't check the record on that, is that correct? A. That is right.

Q. Just tell the Commisison what you did in the way of acquainting yourself with the values of the minerals in this area? A. We have a great demand for subordination agreements on oil and gas leases in our mortgages. In that information that we require, we require the amount of the bonus payment that is made and the term of the lease. My arrival at the value of the minerals is two fold: value of the lease I arrived at by the average amount of the bonuses which had been paid in this general area to southwest of this particular spot here, there were no leases that I could find, or that I knew about that was up close to it.

Q. At that point may I interrupt you, no lease close. What do you define as close? Within the township? A. Within the radius of a mile or two.

206 Q. This thing runs from one end of the township to the other? A. I mean two or three miles of the radius of this group of tracts.

Q. No lease within three miles of any of the tracts that you knew of? A. Yes.

Q. Alright, go ahead. A. I capitalized the value of the

bonus and the term of the delay rentals at 6 percent, which would average out—which averaged out approximately $50.00 per acre. Generally speaking, unless an area has been condemned, the actual value of the minerals in Oklahoma and most anywhere you want to go, will run pretty close to $25.00 per acre. So at the value of the lease plus the overall average value of minerals is where I arrive at the mineral figure.

Q. Then, sir, it is a fair statement that you did not go into the records of this particular area, and base your opinion on information gained from either leases, mineral sales, or other types of transactions in the immediate vicinity of this property, isn't it? A. Five miles was the closest *proximidity* that I came to.

Q. Which direction? A. Southwest.

Q. Is that where Phillips drilled a dry hole, or is that southeast? A. Southeast, I believe. I think it is, I am not sure about it.

Q. Did you check any records on this? A. Checked our records in my office.

Q. You checked your records in your office on some loans your company might have made? A. They were recent leases, in the last two or three years.

Q. None of them in this *vinicity* closer than five miles? A. Five miles was the closest.

207 Q. What was the next closest one? A. Six.

Q. Just one? A. I think there were two around six-and-one-half miles, or two around seven or eight miles.

Q. Is that all of them? A. Yes, sir.

Q. You checked 1, 2, 3, and maybe 4 or 5? A. About five (5).

Q. Either four or five leases that ranged from five to eight miles from the property over in one direction? A. Yes.

Q. And towards the Elk City field, and is that all? A. And I discussed the area with several brokers.

Q. Who? A. Mike Rainbolt was one.

Q. He didn't tell you these leases, he didn't say the farmers were figuring the minerals when they sold their land at $75.00 an acre? A. He said the minerals were worth—

Q. He said $25.00? A. He said $100.00.

Q. Up close to the Base? A. Pretty well into it.

Q. That is what we are considering now, the Base. A. His wording was rather hedgey.

Q. And you didn't get much information of value from him, is that right? A. Not too much, no.

Q. Tell me someone you got information as to value? A. Someone with Anderson-Pritchard, I was sitting here trying to think of his name, it slipped my mind. I have his name in my car, I can't think of his name.

208 Q. You don't know who he is or what he does? A. He is a lease broker, for Anderson-Pritchard.

Q. Where? A. In Oklahoma City.

Q. Has he been selling and buying leases in this immediate area, in this township? A. In this county.

Q. In this area we are concerned with? A. No, he hasn't bought any in this specific area.

Q. You are familiar with the fact that oil comes in pools usually, doesn't it? A. I wouldn't say pools, it comes in spots.

Q. In spots? A. Areas.

Q. But you didn't check the spot we are concerned with as to what the value was on that particular spot? You don't have any geological training, do you? A. General training, just general.

Q. Do you know whether Anderson-Pritchard ever had any leases in this area, in this township? A. I don't think that they did.

Q. And that source wouldn't be very good to tell you what the values were, would it? Is that about all you did on this mineral question? A. Yes, sir.

Q. Now then, sir, there are 10 lawsuits involved here, not just one. The Merz tract, and if we went to the next Tract, 106E, the Guthrie Tract, I find here from your report that you placed a value on that tract, total value of $62,376.25 for the total value of Guthrie's farm with its improvements. Now then, would you explain to the Commission—first, I will ask you did you know that Mr. Guthrie only thought his farm here, that you valued

209 at $376.00 was only worth $156.25 an acre, $220.00 less than what you valued his farm per acre? Did you know that? A. No.

Q. Did you know that your damage to Mr. Guthrie's

farm figured $230.58 per acre, which is about $70.00 roughly more than what Mr. Guthrie thinks his farm is worth? Did you know that? A. Give me those figures again?

Q. $230.58 per acre I believe is what your damage figures out. A. It doesn't miss it very far, that wasn't what my figures are.

Q. Pretty close. I see you came out with one penny on the end here, you probably were calculating a little closer than I was able to. Now then, tell this Commission what in the world you had in mind when you came up with this total value of $60,200.00 for this farm? What did you use to reach that figure? A. I used an idea of the purchaser for the land, and purchaser of the minerals and a building value adde in.

Q. Are you able to state that this value of $60,200.00 in your judgment is the market value for the entire Guthrie ownership of this tract? A. If it was sold separately I think it would approach that figure.

Q. Let's compare it with some of these sales that we have discussed here, those which you are familiar with; every one of them you saw was better land as a whole than this land that has this red-bed and the creek running down through it, on a portion of it, wasn't it? A. Not every tract, no.

Q. All the way across this one. Which one wasn't as good? A. Well, that one over there in 5 wasn't, I think it is 5.

Q. Be sure? A. Southeast Quarter of 5 wasn't as good as that tract.

210 Q. Which tract is that? A. Southeast Quarter of 5.

Q. Perhaps it wasn't, it only sold for $125.00 per acre, and you have a value on this farm for $376.00 per acre. A. Counting the improvements the Southeast of 28 wasn't as good a tract.

Q. Southeast of 28? A. You have a pretty good set of buildings on this tract, a better set of buildings than any tract involved.

Q. Run that through again on the buildings on the Southeast of 28? A. No, I said on the buildings on Guthrie is the best set of buildings of any of the tracts involved.

Q. You valued them at $12,200.00? A. Yes.

Q. Which would still leave $48,000.00. Now then, on this farm from Rivers to McDonald, which you are discussing here, and which you say isn't as good as Mr. Guthries, does it have pasture land on it? A. I didn't see any.

Q. All farm land, wasn't it? A. Yes.

Q. Is Mr. Guthrie's all farm land? A. No, sir.

Q. Has he a red gyp type soil there on one end, where that creek runs through and cuts out a chunk of it? A. Yes, that is a pretty good drain for a dairy lot there.

Q. Good drain for the dairy lot? A. That is right; that would be a pretty boggy place there for milk cows if that wasn't there to drain his lots.

Q. It is your testimony that that old red clay out there adds to the property because the cows wouldn't go in so deep because it has steep inclines where it would
211 drain? A. No, my testimony is that has more value than it would otherwise, due to the type of operation which that place handled.

Q. What type of soil does that Sale No. II, the Southeast of 28, have? A. Sandy soil, very sandy.

Q. Are you familiar with the classifications of the agricultural people called Dill fine sandy loam, and Dill fine loam sand? A. No.

Q. You don't know whether one is better than the other or not? A. Not by those names.

Q. Tell me what else you considered when you were arriving at this $376.00 per acre figure? A. The productive capacity of the tract.

Q. What? A. The productive capacity of the tract.

Q. What kind of soil is this Guthrie land? A. It is a sandy clay, pretty sandy in some spots, and some it runs a little more fine sand in it.

Q. Pretty sandy up there on the south end, or did you walk up there? A. It has some sand in the south end.

Q. Were you there? A. I was right there at the fence line on the other side, on the other side of the fence.

Q. You mean over on Kerkoff land? A. Yes.

Q. Then you know it is pretty sandy there on the south end next to those trees, don't you? A. Yes; it is sandy.

Q. Would you say that is better than that level land down there that McDonald bought? A. Would you
212 call that level down there? Is that on 28 you say McDonald bought?

Q. Yes. A. I hardly would call that level, that is rather a humpy piece of land.

Q. We will have a picture for the Commission later on. In reaching this figure, this damage figure of $230.58 per acre approximately, did you consider the mineral aspects of the Guthrie tract as they would be affected by this lawsuit? A. Yes, sir.

Q. And what was your conclusion, sir, as to whether or not they would be affected? A. I concluded that they would be.

Q. What was your conclusions as to how much they would be affected? A. I concluded that they would be.

Q. What was your conclusion as to how much they would be affected, not dollars and cents, but to the high or lesser amount? A. With the exception of a very narrow strip along the north end they would be total.

Q. I will ask you Mr. Willcox, if you knew that Mr. Guthrie leased this quarter section of land to a Mr. Douglas on August 21st, 1959, which lease was filed on the 4th of this month in the Court House, covering Section 3, and assigned to the Mark Oil Company on September 4th, 1959? A. No, sir.

Q. It covers Lots 2, 3, and the Southeast and the Northwest of it, and the Southwest of the Northeast of Section 3-10-19, the home place? A. No, sir, that was made after I made my investigation.

Q. Made also after this easement had been placed upon this land obviously, wasn't it? A. Yes.

213 Q. And still leaseable? A. Yes.

Q. Would you desire to change your opinion as to the values, or do you still like to stay with those you came out with? A. I will stay with mine.

Q. Did you consider the value destroyed to the extent that this land could not be mortgaged? A. I wouldn't say that it can not be mortgaged, I would say there could be a considerable amount of difficulty in getting a mortgage on it.

Q. I will show you what is a certified copy of a mortgage filed of record in the County Clerk's Office of Washita County, covering the Guthrie tract, his home place and the one across the road, for $16,000.00 which was entered into on the 31st day of May, 1957, which was after this, this was

incumbered by the clearance easement, and ask you if you are familiar with that fact? A. What?

Q. Were you familiar with this fact? A. No, sir.

Offer in Evidence

Mr. Camp: We move the introduction of Government's Exhibit 6. The date is the 31st day of May, 1957.

The Witness: Where other land is thrown in, very frequently the land involved would be considered.

Mr. Whiteside: That exhibit will be admitted in evidence.

Mr. Camp: We have here the official records of some governmental agency, and I don't recall the alphabet.

Mr. Meacham: The A.S.C. Office.

214 Mr. Camp: This is July 25, 1955, the portion outlined with the orange strip being the home 160 of Mr. Guthrie, and the portion of the other half—you can't see the end of the other place that he purchased.

Q. Would you like to look at this, sir? You never have seen it before, have you? A. No, sir. This is the tract he purchased?

Q. Yes, and this is his home place. A. This is Kerkoff here?

Q. You understood that your appraisal was only on the two 80's? A. 83 acres down this fence line here.

Q. Is that what you put the $60,200.00 on? A. No, after it came up, there was another quarter there, I just added the other one in.

Q. You said you added all of it that is in there, this square as the home place? A. Yes.

Q. That is what you placed the $60,200.00 on is the quarter that has a piece out, and the piece out of the other? A. Yes.

Mr. Camp: We offer Government's Exhibit 7 in evidence with the understanding a copy may be substituted, if needed.

Mr. Whiteside: It will be admitted in evidence.

Q. Sir, going to Mr. Kerkoff's land, I am very curious why that you gave your judgment a value of $376.25 to the land owned by Mr. Guthrie per acre value, but on that 200 acre tract owned by Mr. Kerkoff you only figured it was worth $179.75 per acre, is that correct? A. I don't have it broken down that way, but almost 82 percent of his land is rough rolling pasture, and his buildings aren't as good.

215 Q. $200.00 difference in the land adjoining, just put a fence down between it? A. Yes, I have seen it shift faster than that.

Q. The farm land on each side of the fence is about equal, isn't it? A. What little farm land there is there.

Q. You can see from the map that all of the farm land on the south end, over as far as the map goes, there is just a little corner up here where the house is that isn't farm land? From this whole strip from here around and down through here? A. You don't have a road on that.

Q. The road would be out here somewhere? A. You have a little strip of timber there, between the road and that cultivated land.

Q. Is there any cultivated land across the road? A. Right across the north tip of that tract, yes.

Q. Doesn't this running water creek add a good drainage factor to his land, like it does Mr. Guthrie's? A. It is a different type of operation, it has some value there, sure.

Q. Tell me, are you telling this Commission that you are valuing this land by what some individual makes use of it, or what the highest and best use for agricultural purposes would be? A. I am valuing it at what the reasonable cash value would be to probably an average operator, and probably tempered a little bit by the particular operator that is on the tract involved.

Q. Are you able to value it at not what some individual might through his managerial skill might inject into the property, but only what the property itself is worth? A. The property itself will show a value, an increased value or decreased value, depending upon the *ueses* that it is adapted to, and the efficiency of the operation on that particular tract.

216 Q. Then your testimony has not been as to the market value of these tracts, it has been to the managerial success of the individual that might be on it? A. The market value of the tract effected by the managerial capacity of the individual on it. In other words a tract that is well operated will create a higher market value than one which is not well operated. A tract that is improved to take a certain type of operation will naturally effect its market value as one which is not improved to be operated a certain way.

Q. We will submit to the Commission this is not a proper method of reaching values. That the proper method is to ascertain a fair cash market value of the land itself, not what the managerial abilities of an individual add or subtract from the land, and I will have some more to say about that later on. I might submit some authorities if it is deemed necessary. Would you like to use the *the* map marked for identification as Government's Exhibit 8? Have you ever seen it before? A. No, sir.

Q. Does the portion in the upper outlined orange area represent to you what you understand to be the Kerkoff ownership? A. Yes, sir.

Q. Then the portion in the lower orange enclosed area represent what you understand to be the Merz ownership? A. Yes.

Q. And this tract would also reflect that area covered by the official map here, that land to the north which was purchased by Mr. Guthrie and the home place of Mr. Guthrie, wouldn't it? A. Yes, sir.

Q. How many percent of this farm did you say, of the Kerkoff farm, did you say was in pasture land and not in farm land? Did you say 83 percent? A. About 82 or 83 percent. Now, some of that is in tame pasture, that has been fields, but it is in tame pasture now, or was in tame pasture when I looked at it.

217 Q. This map is dated July 22, 1955, less than a year of the date the easement was imposed. This top orange enclosed area, the Kerkoff land, this is the Merz land, and the home place of Guthrie, and the other place Mr. Guthrie purchased. What did you use—

Mr. Meacham: Is that in evidence?

Mr. Camp: We move the admission of Government's Exhibit 8, with the same reservation.

Mr. Meacham: No objection.

Mr. Whiteside: That exhibit will be admitted in evidence.

Reporter's Note: Government's Exhibit No. 8, the original thereof, is attached to the original copy of the transcript.

The same being difficult of reproduction, a copy thereof is not shown in the carbon copies of the transcript.

Q. What did you use as a basis, sir, to come to this

value on the Kerkoff tract which you attribute to it? A. Extremely rolling tract, how rough it was.

Q. Did you consider the sale of the tract to the north and east of it, purchased by Mr. Guthrie? A. No, sir.

Q. Did you consider any sale of any comparable land in arriving at the value you placed on the Kerkoff land? A. I didn't have any sale figures that I checked, any sale places that I checked that were of comparable value to the Kerkoff.

Q. What did you do relative to the minerals of Mr. Kerkoff? Did you totally depreciate them? A. Yes, sir; that is on the land involved, 80 acres.

Q. You totally depreciated the 80 acres? A. Yes.

Q. It is my understanding that that 80 acres runs on both sides of the road? A. Right.

218 Q. So it crosses over. How much of that area across the road did you consider fully depreciated? A. Well, the amount that was taken, it combined on both sides of the road amounted to 80 acres.

Q. I will show you Landowners' Exhibit B, and ask you how much of this land did you totally devalue minerals? A. This line through here.

Q. It is my understanding you left a little strip on the east side of the road and said it wasn't affected? A. Well, you can call it that way. I call it 80 acres, actually what it would be this strip here should not be considered affected, this should be.

Q. Then why would you say that the 167.5 foot strip, that is that wide on the north end at its widest part, should not be affected? A. Primarily because you have got locations spots over here to drill.

Q. How far out would it have to get before it affected the location spot? A. Depending on the spacing that was set up at the time, if there was ever any discovery or any drilling it would depend on the spacing order that came in.

Q. Would it have to be at least 330 feet out here, or does that mean anything to you? A. It would have to be at least 330 feet.

Q. Before it would affect any mineral rights on the tract? A. That is right. Do I get you right, what would have to be 330 feet?

Q. The easement would have to be at *lease* 330 feet over onto a tract of land for the remaining portion of the land, where the remaining portion of the land is large enough to make a drilling unit before it would affect the value of that land in any way? A. Yes.

219 Q. You want to stay with that, is that right? A. Yes, sir.

Q. Down here on Tract 123E, which only goes over 295 feet, it would be your testimony it is not affected, wouldn't it? A. The drilling probably wouldn't be, the leasing would be.

Q. Now then, Mr. Willcox, we were just discussing the mineral value of this land. A. It would be a minor affection up there in that corner, it would be affected.

Q. Let's move along to Tract 119E, sir. According to my calculations you valued that farm at $325.00 an acre, total value, $325.00 per acre, or *$45.500.00*, and you concluded that the damages to this farm were $26,147.67. Did you know that was within $3,800.00 and some dollars, of what Mr. Smith believed his farm was completely worth, the whole tract value, or the whole total value? A. No, sir, that wasn't his figure to me.

Q. What was Mr. Smith's figure to you? Was it different than what he gave in Court? A. I didn't hear him testify. He told me he thought his place was worth $250.00 an acre.

Q. And how much is that times 140? A. That is for the land value, plus the building value, mineral and shelter belt. He didn't speculate as to what that would be.

Q. If he came in here yesterday under oath and said he *though* his land was worth $30,000.00 for all of it, that is a much different figure than what he told you, is it? A. Yes, sir.

Q. What did you consider in arriving at this $325.00 value which you placed upon this land, this Smith tract of land? A. Again it was what a willing seller would sell for and what a willing buyer would pay for each segment of the title.

Q. But what did you base it on? Did you use anything locally to determine the local value? A. My experi-

220 ence in the area, and sales that had taken place in various sections of the county.

Q. Of the 24 sales that have taken place in this township, there were only three that sold for more than $200.00 an acre that you testified you considered, the improvements, minerals and all; one sold for $205.23, one $218.75, and one for $285.71. But yet you have placed a value in excess of $300.00 per acre on each of these tracts. Are you telling this Commission that you did that by relying on those few local sales which you knew about which sold for $125.00 an acre, $137.00 an acre, $218.00 an acre, or $285.00 an acre? A. No, I didn't know about that one.

Q. How do you use those in coming up with such a figure? A. Those tracts were used to check after the others to substantiate the figures here, and the sale prices that went on there were combined rather than segregated unites, or entities.

Q. Frankly Mr. Willcox, you had most of these figures in mind before you came out here, didn't you? A. No.

Q. In looking over your files in your office? A. No, sir. These figures were worked out by me out there on these tracts.

Q. But not with relation to anything that was sold in the township? A. After I valued the tracts then I checked the sales, that is right.

Q. Run that through again? A. After I had valued the tracts originally then I check the sales to substantiate these figures, and in one or two instances I changed them.

Q. Then what you did, you made up your mind from the information you already had, which consisted mainly of your mortgage experience in your office and came out and placed a value on them and then started looking around, isn't that right? A. Yes, sir.

221 Q. How long did it take you to make this appraisal? A. I expect I spent probably—

Q. Two days? A. 40 hours.

Q. 40 hours? A. Yes.

Q. Figuring all of your computations and all? A. No, figuring all of that, I probably spent 150 hours.

Q. How long did it take you to think up this theory? A. Took quite a while.

Q. Let's move over to Tract 122E. I believe that tract of land your total value $55,000.00, or $333.75 per acre.

Did you know that was over $100.00 more than what the landowner valued this land per acre? A. No, sir.

Q. I see here on your work sheet that you typed in that the minerals were unaffected on this particular tract of land. Is that because of the narrow strip? A. Yes, sir; and when I went out and relooked at it, I decided there would be a minor consideration there.

Q. Now then, tell the Commission frankly when you made that change? Was that yesterday? A. Yes, sir.

Q. Was it after this man Mr. Hoover testified, and it turned out that he wasn't much of an expert on minerals? You didn't get here until noon, did you? A. No.

Q. Mr. Willcox, that easement that is on that land would not affect the utility of the land as it could be used for oil development, would it? A. It could be, they could drill on it but there would be a question there of possibility of resistance to leasing that corner of it.

Q. A possibility? A. Yes.

222 Q. But you understand, don't you, that the Court can not award damages or values on possibilites, or on speculation, it has to be matters which are reasonable and prudent? A. Well, on that tract of land there—

Mr. Meacham: Which tract are we talking about?

Mr. Camp. 122E.

A. It would be the affect of some co-ownership of anything coming in there, there would be a resistance on the part of anybody moving in on something that was a co-ownership.

Q. Would it be affected as much as the Guthrie land which just recently leased when it had an 80 some acre coverage, and this only had about an 11 acre coverage? A. No, I wouldn't think so, but I didn't use the same picture on that either.

Q. You used your same formula, didn't you? A. As to the minerals, no.

Q. Did you know that Phillips had a lease on this tract of land and continued to pay the rentals after this easement was imposed upon it, up until the lease expired by its terms in 1959? A. Yes, sir.

Q. Did you use the same consideration in reaching this $174.75 total figure per acre on 122E that you did on the previous tract that you testified to? A. Yes, sir.

Q. Did you write that figure down after you came out from Oklahoma City? A. Which figure?

Q. Your total figure for this property, or before you left Oklahoma City? A. You mean pen and ink anything?

Q. Yes. A. Yes, I wrote that after I left Oklahoma City.

223 Q. You were in the improvements on this property? A. No, sir.

Q. The last time you were out there was 1958? A. Yes, I was not in them then, nobody was home.

Q. Then you have never been in them? A. No.

Q. You have been out on the land there? Have you been out on the land any there? A. Yes.

Q. How far past the fence? A. I drove out, I don't know how far toward the middle of it there.

Q. Did you compare the soils on 119E and 122E in the same manner as you have previously testified to on these other tracts? A. Yes.

Q. And came out with a figure of about double of what the other tracts sold for per acre? A. On the basis of your calculation, yes.

Q. They are your figures? A. Only part of them are mine.

Q. Taking them off of your report? A. I am talking about the figures on the sales.

Q. Those sales that you know about, those three or four? Is the same true as to 124E, did you reach your same value by the same method? A. Yes.

Q. And on 123E, again you stated the minerals were not affected on your report, but inked it out after arriving here? A. Yes, sir.

Q. After their appraiser had testified, is that correct? A. I don't remember whether I inked it out before or after he testified. It was in the afternoon that I was going over my figures.

224 Q. I am going to leave Mr. Davis' ownership for a moment and we will come back and discuss it, but I want to discuss with you for a moment what you considered the Government taking. I believe you said that you had—let me ask you one thing first before I get to that. Did you check the County Assessment Records on this property? A. No.

Q. You don't know whether these people had their assessments lowered or raised as a result of this imposition on the land, do you? A. No, sir.

Q. Mr. Willcox, before we go further this has been marked as Government's Exhibit 9, a map another aerial photo of the remaining tracts in this lawsuit. You never have seen that before, have you? A. No, sir.

Q. I believe all the tracts are outlined there. A. This is Davis, Smith, Rogers.

Q. That is the Rogers land, the tract angles off? A. Yes, this is Hoover.

Mr. Camp: We move the admission of Government's Exhibit No. 9, with the same reservation.

Mr. Whiteside: That exhibit will be admitted.

Reporter's Note: A photostatic copy of Government's Exhibit No. 9 is attached to the original copy of the Transcript, only.

Q. Did *You* know Mr. Smith had a duck pond on his farm, Mr. Willcox, that took in a few acres? A. I didn't recall the duck pond. I called it a little water down there. If it is a duck pond it might have more value than what I figured it.

Q. You weren't down there in the duck season, were you? A. No.

225 Q. Tell me now, I am somewhat confused, I believe on your theory here that you have been testifying, first I would like to ask you how that you arrived at the $300.00 per acre average base figure for this land, when the land value, not improvements, just the land counting the minerals of these sales in this area which we have been discussing only averages $129.01 per acre? A. When you say that averages that you are averaging a lot of land which does not include land comparable, that is land that is the top. When you start running averages you have got to average them according to the acreages involved, and *and* your extreme top and your extreme bottom is what goes to make up an average.

Q. Alright, sir, there has been 20 some tracts of land that have sold around this area in the last few years, being all kinds of land. They have an average value, if we don't count the improvements, of approximately $129.00 an acre. Weren't you attempting to arrive at some average when

you brought this $300.00 figure into being? A. No, sir, I was using a specific case.

Q. How were you using a specific case? A. How did you reach that value originally? A. I attached that value to a tract of land and then started in to reach a conclusion as to how this particular type of easement affected that land.

Q. But that is the second question. The first question is how did you ever arrive at this conclusion as to the value of the land? A. By what would be its reasonable market value based upon the particular tract of land that I used.

Q. I am trying to find out how you arrived at it. I want to know if you actually compared it with something, or whether you thought it up and then came out and looked at it? A. I compared it with something.

Q. What? A. I compared it with that Francis land.

226 Q. The Francis land? A. Yes.

Q. Now, the Francis land was the land that you testified to, as I recall, in the trial on that suit that it would have a remaining value of only approximately $10,000.00, and it recently sold for $38,000.00. You were $28,000.00 off on that. Are you aware of that, do you recall what your testified to on that? A. No, sir, I don't remember.

Q. What else did you consider? A. In arriving at a value?

Q. Yes, I am still trying to find out how you came to this $300.00 base value, what you put everything from, and that is the starting place? A. The productive capacity of it.

Q. Of what? A. The tract of land involved.

Q. Let's get down to cases. What particular tract are you talking about? A. About the Davis tract.

Q. Tell me how that the Davis tract which Mr. Davis bought for $83.33 an acre in October 1954, was used as a basis of a $300.00 per acre figure two years later, less than two years later? A. I don't know what shape it was in when he bought it at that figure, but I do know when I looked at it—

Q. When was that? 1958? A. February of 1958. When I looked at it on February 5, 1958 it was in a very high state of cultivation which I presume if he bought it that cheap he was responsible for building it up, which will

add to the resale value of it, by the greater productive capacity.

Q. When you saw it. You don't know what it looked like back at the time the lawsuit was brought because the physical characteristics of it had been changed by the building that had been done on the Air Base, and the house had been moved and everything? A. That is right.

227 Q. Your base figure is based on something that you didn't know what it looked like, and that is what you based it on? You didn't know what it looked like at the time the lawsuit was brought? The dates of value which are the *critera*, that we are to determine here, That is right, isn't it? A. I could only estimate it from the physical condition of what was there when I did look at it.

Q. We won't pursue that any further then. We will go first to your understanding of the easement, and in trying to apply that to your theory. Did you ever read this theory anywhere? A. This theory?

Q. Yes. A. No, sir.

Q. The fact is that you never saw or heard of it until you thought it up for this lawsuit, isn't that right? A. I read a case in New Jersey which gave me the idea. Now, they didn't use that, but that particular case gave me the idea of coming up with this formula.

Q. This is not a known or accepted or approved method of appraisal by any known standards of which you are aware of, is it? A. There are lots of things that are new.

Q. Answer the question. A. When you say that, they are approved by me and I am an appraiser.

Q. We will put it this way, do you know of any other living soul other than you that has approved this or accepted this method in a clearance easement type of case to calculate damages? A. I have discussed it with several appraisers, and they feel it is reasonable and acceptable, and actually a more practical basis of arriving at it than any other method of doing it.

Q. But you know of your own knowledge of no case where it has been applied? A. No.

228 Q. Who were these appraisers you were talking to? A. I have talked to Roscoe Sears in Oklahoma City, I have talked to a man by the name of Scooley in

Albuquerque, New Mexico, I have talked with a man by the name of Darrough in San Angelo, Texas, I have talked to a man by the name of Pounds in Oklahoma City.

Q. Jim or Ted? A. Jim.

Q. You are telling me all of these people agree with you, or just part of them? A. They all thought it was a practical approach to it. I talked to several lawyers.

Q. Curtis Harris? A. Yes.

Q. Did he help you originate this theory? A. No, sir.

Q. Did Mr. Sears? A. No, sir.

Q. You thought it up on your own? A. Yes, sir.

Q. I believe you stated under your formula that at zero, that would be where this clearance easement started, that you couldn't walk on the land, is that your understanding? A. No.

Q. That is what you stated, wasn't it? A. I don't remember that I said you couldn't walk on the land. I said you couldn't perform your duties on the land.

Q. Tell me why you couldn't perform your duties upon the land? A. Because you couldn't have your machinery setting in there above it, if it came right down to the ground you couldn't have your machinery setting there to do your farming. You couldn't have fences there to hold your livestock, you couldn't have your grain in there planted that would grow up here above the ground. If you could plant a crop that would grow below the ground and your easement came down to the ground you could grow that, but you couldn't plant a crop that would come above the ground if the easement came flush with the ground.

229 Q. Let me ask you this, do you understand that it has been agreed here by all the parties that the highest and best use for this land is for general agricultural purposes, except for tract 142, the fee taking? Do you understand that? A. That is that the usage is for agricultural purposes?

Q. That the highest and best use, you understand that? A. I didn't know there had been any agreement on it. I figured that was the basis on which I made my appraisal for agricultural use.

Q. I believe you stated at two feet they couldn't grow grass, and four feet they couldn't grow cotton? A. I said they couldnt' grow certain types of grass at two foot.

Q. And four feet, certain kinds of cotton? A. I believe you have got your figures exaggerated, but there would be a possibility of not being able to get certain types of cotton on four feet.

Q. And on the Merz tract you said you couldn't grow 14 foot sargo? A. That is right.

Q. I will show you a copy of the Declaration of Taking, which sets out in Paragraph 3, Part I—

Mr. Meacham: Is that in evidence.

Mr. Camp: It is the pleading.

Mr. Whiteside: It is a part of the pleadings.

Q. Paragraph 3 states what they are taking, and then it has a Paragraph I. I wish you would tell this Commission where in there there is any prohibition on having any machinery, or any crop such as cotton, sargo, or any other normal crop not being a perennial or a tree, where there is any prohibtion in that taking of the nature you are describing? A. Cotton plant is a shrub.

230 Q. Perennial shrub? *Real* the full paragraph. A. It doesn't say it restricts it to perennial shrubs, it says any other perennial growth.

Q. It is not a perennial growth. You are not telling this Commission you plant cotton and it comes up from year to year without replanting? A. It does in certain areas.

Q. Not out here, does it, *without* reseeding? A. No.

Q. Show me in there what prohibits your exercising your usual farm endeavors with your usual farm machinery, your tractors, your combines, your cotton pickers? A. This last portion of the sentence.

Q. Read it? I will ask you this, have you ever seen that before? A. Yes, sir, it is No. 2 here. No. 2 is where it does.

Q. Read it out loud? A. Here it says "Or to destroy and to prohibit future structures of buildings or portions thereof, land embankments or other materials." That is the basis of my statement, other materials.

Q. Other materials? A. Extending above the glide area.

Q. That is construction of, or to remove? A. It prohibits the construction or the moving in of any particular thing or materials upon or extending above the glide angle.

Q. It doesn't say anything in there about vehicles or machinery? A. Materials could cover a wide scope.

Mr. Whiteside: We want to know if the Government would be willing for the purpose of this record to stipulate that under this taking as set out in here, I think
231 really it must be construed by the Commission and the Courts, but if the Government would be willing to interpret what their interpretation of these takings are. In my opinion there is no prohibition against any growth or agricultural purposes, or the use of any machinery for the harvesting.

Mr. Camp: I think that is true. No prohibition against machinery.

Mr. Gillespie: Where you have your lowest level, 13 foot at their lowest level, would you say they could grow Sargo 13 feet high there?

Mr. Camp: Yes, sir.

Mr. Gillespie: Would you say they might bring in a mechanical harvester that might extend 19 or 20 feet in the air?

Mr. Camp: Yes sir, that is not a structure. This only deals with structures and perennial growths and embankments of material out there, whatever you have out there.

Mr. Tisdal: Why didn't they state that in here to that affect, we have to take it what they have here?

Mr. Camp: That is the way the Declaration of Taking was drawn.

Mr. Meacham: Would you be willing to stipulate that?

Mr. Camp: Yes.

Mr. Gillespie: Is it your *understand* you could stipulate. One of these Grand River Dam cases in the State Court, they tried to stipulate to take less than they stated they was attempting to take in their petition, and the Court said they were bound by their petition.

232 Mr. Camp: I will say this, that I have no authority to change what is taken in this. However, I will say that the Courts, in my reading of the cases, consider this as an easement to remove obstructions, embankments, structures or trees, perennial growth, and that is all.

Mr. Whiteside: In the event the question should be raised in the futre, we would like something in the record to show.

Mr. Meacham: I would construe other materials would include just anything. For instance, if you put a threshing

machine and it is *stationery*, it is very carefully drawn to get the question of the use mixed up in it to not prohibit the use of this area, but when they shot-gun it in here and says 'other materials' I think it covers everything.

Mr. Camp: It says embankments of earth.

Mr. Meacham: Grass is perennial, or undergrowth.

Mr. Camp: There is no grass or anything out here that is anywhere near that height. I would say that the cases hold that is an obstruction of the glide angle, the trees, and they have a right to top them; and all of the cases I have read reads it has a right to keep the obstructions out. It has the right to remove an obstruction.

Mr. Gillespie: You would have no authority to stipulate into the record, to stipulate on the construction of this?

Mr. Camp: I would state what authorities I have read, what the cases say, is all.

Mr. Meacham: For the sake of the Landowners, I want the Journal Entry to provide, if nobody but the Secretary of the Army can change it, it is going to be up to Judge Chandler on your recommendation, you are more of a fact finding committee; and I want that provided for in the Journal Entry.

233 Mr. Camp: I think those matters have been up before the Courts, before Judge Chandler before, and I think all of the Courts have considered that.

Mr. Whiteside: We have to make a construction of this, and we have to show in our report how we construed this.

Mr. Gillespie: Your construction right now during your cross examination, your construction is that this easement that you are taking here, and have taken, as set out by your Complaint would not prevent the growing of any agricultural crops there that might be higher, for instance, on the Merz tract, 13 feet?

Mr. Camp: That is right, no peremials. There wouldn't be any type of growth that I know of, except trees, that could be in there, and the cases that I have found is where they are talking about material, is sand, rocks, or that kind of material where they moved it off.

Q. Mr. Willcox, you are telling this Commission that you interpret this they can't grow cotton on any tract in this lawsuit, are you? A. No, sir; because I have seen cotton 13 feet high but not here.

Q. It is your opinion that the normal operation of those farms, and you have been out there you say and looked at them, the general agricultural uses to which these properties have been put has changed one iota as far as the agricultural portion of it since the impostion of this easement? A. Yes, sir.

Q. As a result of the easement? A. Yes.

Q. How? A. In case you want to water some livestock on those you can't put a windmill up.

Q. Alright, one windmill where? A. On any tract that would fall where the glide angle would fall below the normal height of the wind mills. I have seen wind
234 mills 16 feet high and I have seen them 100 feet high.

Q. 100 foot wind mills? A. Yes.

Q. Is there enough wind to blow one if it is only 20 foot high? A. I am not saying there is one 100 foot high in Washita County.

Q. The normal wind mill is probably 20 or 25 feet high? A. I would say 30 feet high.

Q. That would mean on the Merz tract, on the south third of that you couldn't place one wind mill of that height. You could put a shorter wind mill there, is that right? A. You could put a shorter wind mill down in there somewhere, but it might not do you any good.

Q. How is that? A. You have to get that wheel up there where when you have a heavy wind you are not going to worry about getting enough wind to turn it. The important things is in the summer time is for that wheel to get enough wind to make water.

Q. It is your opinion that the difference between 20 and 30 feet—30 foot windmills would be very important in getting enough water in this country? A. I have seen it happen, 10 feet difference.

Q. Don't you consider that rather speculative? A. No, sir.

Q. One windmill. What is the value of one windmill? A. Are you talking about a windmill costs, or the value of what a windmill produces?

Q. We can still put the windmill on the farm, but we might have to move it a little bit. We will take the Merz farm for instance? A. There is a corner there that you

might get a windmill on sufficiently adequtae to pump a little water, yes.

235 Q. It has two corners that doesn't have an easement imposed upon it, doesn't it? A. Two sides?

Q. Yes. A. One side.

Q. Strip on the east side and a strip on the west side, isn't there? You don't know? A. Well, I don't have that plat I made with me here, and I have forgotten.

Q. It has been stipulated that the Merz tract runs from 13 feet on the south to 50 feet in the center, and 70 feet on the north, approximately. A. Yes.

Q. So there wouldn't be more than a third on the south portion that you couldn't put a 30 foot windmill, would there? A. About two-thirds.

Q. Well, when you get to the half-way mark you have a 20 foot clearance? A. That comes up relatively slowly though.

Q. You mean you understand this angle changes, as it goes out across the land? A. Sure does, on this particular one it does.

Q. What value do you attribute to the Merz land that you can't put a windmill where it would protrude up 30 feet because of this glide angle? A. Probably a third of the total land, of the total land that is covered with the easement.

Q. On the Merz tract you valued the land at $52,000.00, and you say on a third of that you would attribute how many thousand dollars to the fact you couldn't put a windmill on one given little spot out there? A. I haven't attributed any definite amount to any specific item.

Q. I though you just said you attributed a third to that? A. No, I said there was a third of the land area that you could not put a windmill on.

236 Q. Alright—A. But that does not mean that I attributed the whole value that I considered for damage there, just because you couldn't put a windmill on there. There is a lot of things you can't put on there.

Q. What is that? A. Buildings, or can't plant a shelter belt.

Q. Are you aware of the fact that he didn't have a building on the farm that was up high enough that had to be moved except his house? That none of those other build-

ings extended into the glide angle plane? A. It took his barn; didn't it?

Q. I don't believe it did. A. That was my understanding.

Q. So he can't put a barn there, but you understood he could put it elsewhere on the farm? A. He had to put it elsewhere on the farm.

Q. Would he have to relocate his windmill and barn? A. Yes.

Q. What else does this easement limit on the Merz farm? A. Planting of shelter belt, or any shade trees.

Q. Not totally? A. Well, shelter belt to do him any good would have to be on the south side of his land to stop the prevailing winds. The prevailing wind in this area is in the south, so the shelter belt to do him any good on his specific piece of land would have to be on the south.

Q. Couldn't plant some trees. What else couldn't he do under this easement, your interpretation of it? A. The principal thing he couldn't sell it for what he could with the easement off of it.

Q. Have you checked whether or not any of these easements are selling over the country at other air bases?

237 A. No, sir. I didn't say that he could sell it at all. He couldn't sell it for what he could without the easement on it.

Q. Do you consider that substantial or only small? A. On this particular tract I considered it substantial.

Q. $1,000.00? A. You mean difference between what he could sell it?

Q. I am talking about the rights that we took, I want you to separate that from the operation of the base. That is not within this suit, just what rights we take. He has to relocate the windmill, he has to move his barn, and he can't put trees at certain places. What other rights and how many dollars are you going to put on those? A. Those rights, or limitation of rights are what affects market value, and the market value is the principal thing that I was concerned with in making the appraisal here. On this particular case the damage that I figured to his land on this tract was $27,108.00.

Q. I thought it was $37,210.88? A. I said land, I didn't say the minerals.

Q. You say because he might have to move his windmill from certain areas? A. No, sir, that isn't what I said.

Q. State that again? A. I said that the restriction imposed by the easement damaged his market value of the tract of land the amount of $27,108.00

Q. But what I want to know what those elements are that you are talking about, and you have told me you had to remove the windmill, move it over to another place, you had to move a barn, and it prohibited you from planting trees. What else? A. If you are wanting to sell a piece of land you have got to find a buyer that will be happy with the restrictions that are imposed by the easement, and
238 the actual moving of those buildings has already been done, but then the fact that you can not go in there and nobody else can go in there and put those buildings or anything in there to conflict with the easement is the restrictive factor.

Q. And it boils down that you are placing $27,000.00 plus on the fact that this man could not sell this farm to somebody because someone would consider it was damaged $27,000.00 because he couldn't move the house back up on the hill where it was, or his barn back up there, is that what you are telling this Commission? A. There is a restrictive element in that easement, and whether he could find someone eventually to buy it with that easement on there without regard for it might be possible. There are all kind of exceptions to prove any rule, but the average buyer—the average individual interested in a piece of land would go elsewhere than to get one that was hampered with a restrictive easement.

Q. Mr. Spradlin didn't did he? A. Which one is that?

Q. That is the farm I believe that you said ought to sell for $10,000.00 that sold for $38,000.00 with the easement on it, your last testimony when you were testifying in the trial before? I understand that is your figure. A. I don't remember what my figure was.

Q. So he is the only one that we have to go by right here at the Base, and he bought it with the easement, and he is farming it, and it is not interfering in any way? A. It hasn't yet, it doesn't mean that it won't.

Q. Let's go over here to the Guthrie tract. Maybe we can make it a little clearer there. Keep in mind the clear-

ance easement to prohibit this obstruction above a height of 71 feet on the south line and 163 feet on the north line. Not any windmills are going to have to be moved there, are there? A. I wouldn't say so.

239 Q. Not any barns? A. No.

Q. He is still going to be able to farm it, and in fact is farming it like he always has, is that right? A. As far as the actual operation today is, by the individual who is operating it today.

Q. He can still farm it as well as he could before the restrictions of this easement, and in fact is doing so, is that correct? A. That is correct.

Q. Then the only damage that you can attribute to this is not on the general agricultural purpose, because it doesn't depreciate it, but it is only on the fact that you think it might reduce the sale, interfere with his little bundle of rights, and somebody would have to go out and measure it and not have any obstruction too high? A. Yes.

Q. Does it cost $25.00 or $50.00 to have the County Engineer to go look at your abstract and tell you that it wouldn't interfere with your farming at all? A. The average buyer isn't going to go do that, he is going to walk off and buy another tract of land.

Q. How do you know that when you haven't testified anything to what the average farmer would do in these *area*, and they have done contrary to what you say, they have even leased this property for oil and gas? A. Another tract?

Q. This tract. What element of damage can you tell this Commission besides additional expense in the abstract and if his attorney looks at it then he might want the County *Engineer* to tell him what these measurements are, and he can still farm it by your own admission as well as he could before. Now, what would those cost, maybe $50.00, couldn't cost more than that? A. Surveying those air figures, I believe you would have to get someone besides the County Surveyor ont here to do it. He wouldn't have

240 the equipment to get up there and survey his glide angles with respect to this. He couldn't put a stack up there to show on a tract of land up there, and the air above it where he was measuring from.

Q. You don't believe your County Engineer would be

competent to compute this little angle up across this man's land? A. No.

Q. Suppose you had to hire someone that went to school longer than your County Engineer, it might cost $100.00 then to get him to go out and do this with these instruments? A. It would cost $100.00 a day or better, on the basis of *todays* prices.

Q. How many days do you think it would take this Engineer to look at that map which is an official record here and is available to him in the Court Files, he can look at it and he can see the elevations that are already on it, he can see the starting place, and he can see where it goes over, he can see the contour here which is already spelled out on his map, how long do you think it would take him to calculate that area? A. It wouldn't take too many days to figure it out, but then if I was going to buy it and contract with somebody, I would want that place checked.

Q. I think you could get it checked for $100.00, don't you? A. It is possible, but I wouldn't say I could do it in a day, or that he could.

Q. Say $200.00? A. Alright, I would go along on $200.00.

Q. $200.00 for an Engineer. Then you would know what you had when you bought this place, you would spend $200.00 for an Engineer to tell you what you had and then you would know that could still farm it in any way that you could before, so that is all the expense you would be out, isn't it? A. You would still have a partner in the title.

241 Q. And according to your figures you would have a $19,100.01 partner in the title? A. $12,900.00.

Q. That was adding the minerals to it. Of the $12,900.00 partner, when you by your own statement as their witness recognized the fact that it doesn't interfere with his farming operation, not this taking. If something else is happening that might interfere with his values but not this? A. My interpretation of this is the way the market value has been affected by primarily the co-partner in the title.

Q. Is it primarily the co-owner in the title, or the fact the Base flying the planes over this? A. Co-partner. Flying those airplanes, nothing said in this easement about airplanes, and may never be an airplane fly over it.

Q. You have been advised of that, but have you made inquiry as to these potential purchasers and sellers, basing their values and their prices on these limitations here which you say would cost $200.00 for an Engineer to show him and wouldn't interfere with his farming, would they mistake that value and some other use on this property that is not in this lawsuit? A. I haven't run into any potential buyer, so I couldn't tell you.

Q. This testimony about its reduced value is not based upon any fact that there was any sale or any potential buyer, has it? That is your own idea of what it would be? A. That is all.

Q. That was your own idea, is that right? A. Yes, as well as all the other appraisers.

Q. The same as to all of them? A. Yes.

Q. If we go over to Mr. Kerkoff, and his property is substantially the same heights as Mr. Guthrie, the same thing is true as to Mr. Guthrie? A. Yes, sir.

242 Q. 69 feet to 164 feet. He can still farm it as well as he ever could as far as this taking is concerned? A. However, in that particular tract the big handicap there is over buildings which is at the low end.

Q. You are not telling this Court that 164 feet over that low end interferes with those buildings, are you? A. The low end is 69 feet. That is the one where I had a different set of figures.

Q. 69 feet is the south end? A. He might want to put up some sort of—now that we have got television, that would restrict him on perhaps getting up to where he might want to go for a television tower.

Q. There is a lot of perhaps, maybes and mights in there, but have you looked at his television tower? A. I haven't seen his picture on his television, I saw the tower that is there.

Q. And the height of the tower is pretty tall, it might be 30 feet tall? A. Might be.

Q. It is a pretty tall television aerial. That means it would have 130 feet to go down there on the end where the house is, doesn't it? A. Kerkoff?

Q. Yes, A. No, that is the 69 foot end.

Q. No, you are confused. It gets higher as it goes to

the north. A. The buildings on the Kerkoff tract is on the south end of the tract.

Q. Well, they are about in the middle of it, aren't they? A. They are south of the middle.

Q. We have a picture of them over here. A. They are south of the middle.

Q. Did you know that that windmill at Mr. Kerkoff's house, the top of that windmill was 62 feet below the glide angle plane? A. No.

243 Q. What on there on Tract 107E could this particular taking here—you admit, don't you, that it doesn't interfere with the farming operations of this property? A. That is right.

Q. So the only expense involved is to get someone competent enough in Engineering to tell you that was a fact, that that was high enough that it did not interfere with the farming operation? A. Without the little dickering power between the buyer and seller that it might have by reason of it being there. The limitation is still there by the co-ownership.

Q. He has a limitation. He has a road out there, that is another co-ownership? Some of these people have pipe lines across their land, those are co-ownership? A. Yes.

Q. But they don't interfere with the highest and best use of this land which is for agricultural purposes? A. Any easement?

Q. I am talking about the road easement? A. Well, the road easement interferes with the agricultural use of that particular land involved, but it also helps the rest of the land because you couldn't get ingress and egress without the road. One off-sets the other. It is just a little narrow strip of ground anyway.

Q. But it actually takes some of his ground where he can't farm it? A. Yes.

Q. This doesn't take one inch of his farm, he can still farm it as well as he ever could? A. But the restrictions are there.

Q. On Tract 118E, the Davis tract, we will leave that to the last and discuss it then. Let's go to 119-E, Mr. Smith. Mr. Smith's property, according to the stipulation of counsel, enters at approximately 81 feet on the

244 north, we are down at the south end of the base re-

member, that enters at approximately 81 feet on the north and goes out at approximately 145 feet on the south? A. Yes.

Q. Same is true to that as 106E and 107E on those heights, this is even higher, isn't it? It starts at 81 feet where the others started at 71 and 69 feet, so it doesn't interfere with his normal farming operation itself, not this taking, that is true, isn't it? A. The only thing about that was that I was told that his shelter belt had to come out, which it hasn't come out, and according to my understanding now it doesn't reach up into that glade angle. But I was told at the time that I made my preliminary appraisal that that had to come out, and that is the only thing that might affect the agricultural use of the land there.

Q. Now then, so his only agricultural damage, there just wouldn't be any, would there? A. Unless up there in that pasture on that north end there he would want to put a big windmill up there, and that would have to be a pretty high windmill.

Q. It would cost quite a little bit to get a wind mill that high, and get somebody to erect it? You will admit that would be expensive? A. Yes.

Q. Entering Mr. Smith's at 81 feet and going out at 145 feet, does not interfere with this agricultural use of the land? A. That is right.

Q. And again as in the other tracts, the actual expense item of satisfying yourself as to where the lines were, plus the dickering value that you would have on having an easement up there are the only two items that would be damage to this farm, isn't it? A. Well, if you have reference to the limitations of the easement as the dickering value, why yes.

Q. The fact that there is an easement up there and somebody might say there is an easement there so I won't pay you quite as much for the farm? A. That is right.

245 Q. On 122E, that is the Rogers farm, I believe Mrs. Rogers testified that her house was not in that area, I am not sure, but it has been stipulated that the tract enters her property at 105 feet and leaves at approximately 145 feet? A. Yes, sir.

Q. There is not any *conceiveable* interference by those heights on this farm, for its highest and best use which is agricultural, and *and* it has been so agreed, isn't that correct? A. Yes.

Q. On 124E, the Hoover tract, it has been stipulated that it enters at 109 feet on the north and extends to 150 feet on the south. That again could not conceivably interfere with a normal agricultural use of this property, could it? A. That is right.

Q. Mr. Willcox, Mr. Smith testified that the engineers were negotiating a removal of a portion of a shelter-belt which is out in the center of his property was an estimated cost of $1,000.00, but I see here that you have placed a damage figure on this tract of not only the $1,000.00 but of $14,755.00. Is that right? A. That is right, yes.

Q. When you drew up these figures did you at that time have clearly in mind that this would not interfere with the farming operation? A. Yes, sir.

Q. And you still feel that is the correct figure? A. That is right, yes.

Q. At what height would you say that it interferes with the general farming operation? A. You mean on any glide angle?

Q. Yes. How low does it have to be before you consider that it interferes with the normal farming operation itself? Would 25, 30 or 40 feet, or where would that be? A. I would say that probably in the neighborhood of 60 feet.

246 Q. Of 60 feet? A. Yes.

Q. Now then, if that 60 feet interfered with the normal farm operation, what would you say or consider that 60 foot elevation interferred with? A. The possibility of the improvements, some feature of improvements which might be desired in there.

Q. Now then, consider this— A. As far as actual crop growing, no.

Q. Consider this as to the improvements on the land that we are dealing with. Now a 60 foot building would be about a five (5) story building? A. Yes.

Q. So they are not going to build any five story buildings out there? A. They might have to go up with some shade

trees. If I had a set of buildings there I would certainly want some shade trees around them.

Q. If they couldn't grow shade trees more than 60 feet high on their property. The 60 foot would be adequate where you could grow a nice shade tree? A. I think so, yes.

Q. If it was about that it wouldn't interfere with the normal agricultural pursuits of the property, would it? A. That is right.

Q. Then how do you reconcile that figure with the figure that it is 200 feet? A. The 200 foot figure that I used was based on, arriving at a figure that would be beyond any question of doubt as to anything coming in there, any factor entering into it.

Q. Mr. Willcox, let's limit it not to any possible questions, but let's limit it to probable things that a reasonable prudent man would expect, disregarding the oil phase, and staying on the agricultural phase. Your 60 foot figure would be more nearly accurate, wouldn't it? A. On strictly agricultural, yes.

247 Q. Then this formula, we will call it the Willcox formula— A. Thank you.

Q. How would you apply it to this agricultural value if 60 foot, if it is above that it is not damaged all for agricultural purposes, and if it is lower it would by a degree. From 40 to 60 foot how are you going to damage it equally as from a 10 to a 20 foot restriction? A. Well, I think between 10, 20, 40 and 60 that it would, yes. It won't be very much difference in the damage between 1 and 60.

Q. You think that having a 20 foot restriction on your land would be a third more damaging than having a 40 foot restriction on your land? A. No, that isn't what I said. I said a 20 foot restriction would be, or 40 foot restriction would have relatively the proportion the same damage as a 20 foot.

Q. Let me put it this way, if you had a 30 foot restriction on this land and there is no damage to the 60 feet, would that half way damage it, the value? A. That is the basis of this formula, yes.

Q. I realize that, but I am trying to understand how you reconcile that a restriction up to 30 feet that you couldn't put your normal house and your barn there, is equally—

A. Wait a minute, you should not start from going up from the bottom, you should start coming down from the top.

Q. What? Why is that? A. You have a freedom of movement underneath there.

Q. If your theory is correct the adverse of it is also correct, isn't it? A. No.

Q. Why? A. Because your limitation is on this formula, if you take 60 feet and you take the top 20 feet of it from that you still have a freedom of movement on the bottom 40 feet.

248 Q. Alright, if you take the 40 feet and go up to 60, it is the same thing, 2 plus 2 you just turn them around? A. No, it isn't, because you are completely restricted on the bottom, and you can't farm anything on that 20 feet up in the air.

Q. Then how are you going to take the 30 feet area up here in the air that you can't farm and give it an equal value to 30 feet down on the ground that you can farm? A. Because your restriction is there. On the basis of this formula your restriction increases as you come down, and by virtue of the fact that you just use 10 feet of it up here you have a very nominal restriction.

Q. That is the point. A. And you have a very nominal damage.

Q. Then the 10 feet up there is not as valuable as 10 feet down farther? A. It is just as valuable, ye

Q. But it can't be nominal and valuable at the same time? A. Just as valuable per restriction.

Q. Let's just take this 60 foot and divide it in half, and you tell me how the 30 foot up above that you can't farm, and you could put a shade tree there, but it would only be a 30 foot shade tree, and the difference between a 20 foot one and a 60 foot one, and the difference between a 30 foot T.V. Aerial and a 60 foot T.V. Aerial, and tell me how you are giving them equal value? They are the some number of feet. A. That is right, your restriction there decreases your market value, and if your market value is decreased on the amount of land involved, it is decreased on the basis of the way the land is affected. Therefore, you start up here and come down, and whatever you put your ceiling at, which I used 200 feet, you come down this way, and if where you have got an average of in

this Rogers place, 74 feet average thickness in the air there, you are applying the damage to the air involved and the acreage involved.

249 Q. I want to know, you say the acreage in the air is not damaged for agricultural purposes. You admit that above it doesn't have any damage agriculturally? A. As far as producing crops, but you still got a co-partner in the title.

Q. If you reapplied this Willcox formula to the 60 foot area which you recognized above that, that could not interfere with any of these operations? There wouldn't be any farm in this lawsuit except the Merz farm and the Davis farm that are even in that area? Do you realize that? A. I guess that would be right, however the easement covers air on up there.

Q. You don't recognize the only air this particular landowner can use is that what he can utilize, and this only takes away from him certain rights? A. His title is clouded, or I say his title is clouded when he has a co-partner to that additional air there.

Q. If you applied your formula to this 60 foot, would you come out with a $90.00 base at $1.50 a foot? A. You mean $90.00 an acre?

Q. Yes. A. Well, it would have to be based on starting in at the ground on the value of the ground, because when you come clear down to the ground you are going to restrict the use *the use* from the standpoint of fencing and—

Q. Assume we have this ground here on a per acre basis, it had a value of $60.00 under your theory? A. Up to 60 feet it would be $1.00 a foot.

Q. So the ground would be damaged $30.00 an acre if the easement were only 30 feet high? A. 30 feet down.

Q. They are the same, starting at 60 foot? A. No, if you went up 30 feet you would take it all. You would take the whole 60 feet.

250 Q. You do recognize the fact if the easement over this land at 30 foot elevation, under your formula he would be entitled to $30.00? A. If he started from the ground up he would be entitled to the ground damage, up to 30 feet would be $2.00 an acre.

Q. That would be his total damage by the time he got

to 30 feet, and the second 30 feet would be—the man over here you placed the same formula to, he wouldn't have anything coming on that second 30 feet then? A. If you are going to take away a man's 100 percent effectiveness regardless of the height you go up here, all you have to do is take a foot down here on the ground.

Q. Let's stay with our facts. If we have a 30 foot taking, and you have this base figure. A. Where are you going to start with your 30 feet? From the ground up, or start up here at 60 feet, or 100 feet and come down to 30 feet? It is entirely different.

Q. All of these easements are so far above the ground? A. That is right.

Q. We recognize the fact that if it is 60 feet or more, then there is no agricultural damage, we have established that. A. Alright.

Q. Will you agree to that? A. Yes.

Q. So if we divide that half into and go 30 feet, it doesn't matter whether you come down or go up, it is the same place, it is still 30 feet above? A. No, sir.

Mr. Whiteside: I think the Commission recognizes the 60 foot thickness you are talking about.

Q. Let's go to Tract 118E. Now think, sir, on this tract here. Do you understand that certain rights were imposed at the height of 32 feet to 85 feet by the Declaration of Taking in the first portion of this lawsuit on March 8, 1956? A. Yes, sir.

251 Q. And what was your value for the total tract of land, 60 acre tract on 118E before this suit was brought? A. On the land value I have a value, I don't have it added together here, but it is approximately—

Q. The total value, the value of the 60 acres? A. Land and minerals?

Q. The fee, you understand what fee means? A. Yes, sir.

Q. That is total, that is all of it. I want to know what that value was before the government interfered with this man's rights? A. $23,130.00.

Q. Now then, I believe you said you didn't consider the fact that this man paid $5,000.00 for this farm less than—well, from October of 1954 to March of 1956 when

this suit was brought, that would be 15 months approximately? A. Yes, that is about the length of time. No.

Q. So you didn't consider he paid $5,000.00 for it at that time? A. No, sir.

Q. Well, then how in the world did you reach this $23,000.00 figure on this property? A. On the basis of market value on it, on its present productive capacity at the time I looked at it.

Q. That was in 1958? A. Yes, sir.

Q. That was the first time you looked at it? A. Yes.

Q. That was after the runway had been extended, and the general characteristics of the property had been changed, and the house had been removed? A. That is right.

Q. Could you explain a little more factually what specifically you valued this farm on? First, let me cover
252 one thing. Did you gave any value on this farm on the sand the owner talked about? A. No.

Q. That is in 142 or 142E? A. I was told there had been one there. As far as my knowledge of what was there there wasn't any evidence of it there when I was there. That runway extended out there, and I took it on the basis of the agricultural value.

Q. Agricultural value? A. Yes.

Q. Tell me the agricultural layout of this farm which would have a value of almost $400.00 an acre, if that were $24,000.00 instead of $23,130.00? A. That would be agricultural and mineral value.

Q. We are concerned with the total value. A. That is agricultural and mineral.

Q. Tell me what about this farm agriculturally, that made it so valuable? A. That place evidently that had been used pretty hard, and there had been a deep plowing job on it which increased the friability considerably.

Q. What is friability? A. Ease of working it.

Q. This was kind of a sandy loam? A. It started out from the looks of it like it was a very sandy loam, and there had been some heavier land brought up to the surface on it.

Q. You don't know where that was brought from, do you? A. Down below.

Q. That is what the deep plowing did on it. You don't know but what Peter Kiewit brought that in from the construction on the base and piled it on there? A. I didn't know that. It presented the evidence of plowing had done it rather than that.

Q. Did you check the agricultural people and see if he got a subsidy for deep plowing? A. No, sir.

253 Q. Now, as a matter of fact that is a general agricultural plan that is in vogue the last few years? A. That depends on the type of deep plowing you do. You can go out and do a job just with your own equipment and do some deep plowing there, and work up some subsoil into your top soil, or you can go out and get a big 24 to 36 inch plow and that type of deep plowing and then you are entitled to your agricultural payment on it.

Q. Now then, what kind of a plow was used here? A. I assumed it was a regular farm operating plow.

Q. You mean a one-way or mold board type of plow? A. I thought it was probably a one-way, or a disk plow. Let's put it that way.

Q. A regular one-way or disk plow. You couldn't plow more than six or eight inches, could you? A. Yes, sir.

Q. How far down could you go this one-way? A. I have seen a good two disk plowing down 12 or 14 inches.

Q. You are considering a 12 inch plowing here a deep plowing? A. In this particular instance it appeared to be adequate for the time being anyway.

Q. But you don't know as a fact that it took place? A. That was just the general appearance of it with the surrounding country.

Q. All you saw was that little bit left under 142E, is that right? A. A little bit, it was three-fourths of the total acreage involved.

Q. Is that land level? A. I have seen people that would call it all level, except a little tiny strip of land along the west side. It isn't what I would call level, I would call it slightly undulated. When you come down to a piece of land my terminology of a piece of land that is

254 level, if it is level land it is usually so flat that it won't drain.

Q. This land has a ridge on it, that they dug a hole out of the side of it there on the west side of the property

and hauled some dirt over? A. Yes, sir, about three acres.

Q. And it is sandy land, isn't it? A. Yes, sir.

Q. What was it planted to when you saw it? A. When I saw that hillside it was in grass.

Q. So this grass land was worth $400.00 an acre? A. Tied in with your unit, yes; by itself, no. But averaged out with the rest of the units I would say it was for agricultural and minerals.

Q. Would this land have as much value as a tract large enough to be farmed with more than just a little 40 acre or 60 acre tract, would that effect its value? A. That would effect its value if that is all a man had to operate, but this was used in connection with other land.

Q. The fact that this land wasn't large enough to have a house on it, and farm and be self supporting? A. That is right.

Q. Would you say that added to or decreased from it, that small tract of land? A. It could do both, and it could counteract each other. In this particular instance the way this was handled I would say that it did not affect it.

Q. What specifically in this township did you compare for you to reach this almost $400.00 an acre value on this land? A. $25.00 of that was mineral value as a separate entity, and the rest of it was $300.00 an acre, which was an average based on its soil type and saleability of that particular type of soil based on its productive capacity.

255-259 Q. Let me ask you this, did you on this 60 acres conduct any soil examination? A. What do you mean by soil examination?

Q. Did you run any chemical tests? A. No, sir.

Q. Did you go to those persons who are skilled in it, the agricultural department who had classified the soils and studied their reports to see what the soils on this land, which you didn't see because they had hauled it off in the meantime? A. On that north end I didn't, because it was a continuation of what was already there in sight.

Q. Did you on any of it, not only on the north end, on this 60 acres? A. I could determine what the soil type was without going to somebody else.

Q. The answer is that you did not check with the soil classification groups, or the soil material which the government has had their experts analyze and set up and map out, is that correct? A. That is correct, yes.

Q. Have you had any school training in classification of soils? A. Yes, sir.

Q. In college? A. Yes.

Q. What was your major? A. Agriculture.

Q. Where? A. University of Illinois.

Q. Is the land up there anything like this out here around the Air Base? A. I can find you some that is even sandier than that.

Q. If it was much sandier than this it wouldn't grow anything but weeds? A. It would grow sand blue-stem, I was there last month and saw sand blue-stem on some of it 10 feet high.

260 Q. Tell me how this clearance easement which started at 32 feet on the north side of this land, and was 80 feet on the other, effected the use of this land? A. It would encumber his title.

Q. That is about it, isn't it? A. (No answer)

Q. He could still farm it as he could before? A. He could still farm the part the easement is on.

Q. We are talking about this you didn't see, I know it is difficult, probably not even possible, but that is what we are discussing. We have three tracts and the Commission has to reach a value on each of them. Now then, on this first tract 118E at 32 feet high on the north end to 82 feet on the south end, that did not interfere with the general agricultural use of that particular land, did it? But if it had a value that you place on it at $23,130.00 before that, what value did you place on it after that? A. After that particular easement?

Q. Yes, sir. A. I measured it with the second taking because I determined there wasn't any difference in the value, that is what the value was, the amount of damage was the same.

Q. You mean that you considered the 118E taking not to have a damaging effect upon this property? A. No, the same damage—the same damaging fact as the other, and when the other was taken it just simply increased the limits there.

Q. I don't believe I understand you. When did you place a damage to this property, by the first taking or second taking? A. A combination of the two takings.

Q. The Commission wants to know what you placed on

it the first time, so let's take it. A. Would you give me those heights again?

261 Q. 32 feet on the north and 85 on the south.

Mr. Meacham: We don't have any objection to this, but I think if the Commission please, I think it is a waste of time. This witness has testified that in his opinion there was no difference in the market value, he takes the ultimate easement instead of placing it up in these various categories.

Mr. Whiteside: Is it his testimony that the value of it on the second taking was the same as it was prior to the first taking?

Mr. Meacham: His testimony in chief, and again today, the value of this property on March 8, 1956 was the same as it was on March 4, 1957, and his testimony on direct examination was on the ultimate easement which is 17 to 42 feet. But if you want it separated it is alright.

Mr. Camp: I asked him if that meant there wasn't any damage by the first taking, which if it remained the same as the first when the second one was begun, then there wasn't any by the first. It couldn't remain the same.

Mr. Meacham: Disregarding the easements that is what I meant. That is what he testified to. Just ignoring the easement, the basic land value.

Mr. Camp: If I understand you properly you are saying the land value on this 60 acres was the same on March 4, 1957 as it was on March 8, 1956?

Mr. Meacham: If you disregarded the easement.

Q. This is $12,422.75, what is that figure? A. The damage on the basis of my formula on the easement as it affects 60 acres, that is the preliminary taking.

Q. That is the damage, that is not the after value? A. No, that is the damage.

Q. Does that remain, your remaining value $10,707.25, is that right? A. I think that would be just about right, yes.

262 Q. Now then, this $12,422.75 figure, you concede do you not, that this taking does not interfere with the normal agricultural use of this tract being from 32 to 85 feet? A. That is right. That is mostly agricultural value. Down on the north end there is a possibility that it might interfere with the windmill if one would put one up there.

Q. Your 30 foot windmill would still clear by two feet? A. A 30 foot one would, yes.

Q. What other factors did you use in reaching this $12,000.00 figure? A. Co-partnership in the title.

Q. By virtue of this having this easement, just having the easement on this land which has its greatest value because it has good farming potentiality or ability, production capacity. This doesn't interfere with that? Your land is only worth $10,707.00 to farm afterward, you took $12,000.00 away? A. That is market value, saleability factor.

Q. Does that $12,000.00 figure include your minerals? A. No, sir.

Q. Let's put them in just to see how it comes out. A. $16,856.75.

Q. That is your damage figure when it includes the minerals, is that right? A. Yes, sir.

Q. How much does that leave of the after value of your farm? A. $6,063.25.

Q. Now then, you still have your 60 acres which you could farm, but instead of it being worth almost $400.00 an acre it is now worth only $100.00 an acre to farm, is that about right? A. That is about right; not to farm, but to sell.

Q. Still farm it just as good as you could then? A. That is right.

263 Q. Tract 142. They were taking approximately 15 acres. What was the value of that tract? A. Before it was taken? Before any taking, or after the first easement? At the time the fee was taken?

Q. At the time the fee was taken, that is correct. A. $1,357.13.

Q. What does that figure represent? A. That figure is the value of the 15.49 acres after the easement, the first easement has been taken, and the overall value of that tract of land left.

Q. $1,357.13? A. Yes.

Q. That was the value of 15.49 acres that were taken, is that right, or is that what is left after you take the 15 acres? A. That is what is left in, that is the value of the 15 acres after this first easement was taken.

Q. Then the land has diminished by your figure of $1,357.13, is that correct? A. Now, I don't think that is correct. I was looking down here and didn't get your verbage there.

Q. When the 15 and a fraction acres were taken, the land that had a value of $6,273.00 was diminished by $1,357.00, is that correct? A. No, the land that had a value of—here is what it is. The surface damage on the first easement was $3,289.00 on this 15 acres. The mineral damage was $75.00 an acre.

Q. Let me understand—— A. My valuation on the 15 acres before anything happened to it.

Q. No, we want what it was worth at the time we took it. That is the only interest we have here. A. That is what I am saying, before anything happened to it, at the time of the taking.

Q. Something had already happened to it a year before that? A. I am going back to that time.

264 Q. By date, what time are you talking about? A. The first taking which was March of 1956. The value of that tract of land was $6,867.15.

Q. What tract of land, the 15 acres? A. Yes, that was the taking.

Q. Something had already happened to it a year before that? A. I am going back to that time.

264 Q. By date, what time are you talking about? A. The first taking which was March of 1956. The value of that tract of land was $6,867.75.

Q. What tract of land, the 15 acres? A. Yes, that was reduced by the first easement.

Q. Let me get that figure again. A. $6,867.75.

Q. In other words you took your $23,000.00 and divided by four, is that right? A. No, I just calculated the value on 14.49 acres.

Q. He had a 60 acre tract and it came to $30,000.00? It doesn't come out that way. That is roughly $1,000.00 over. A. There was a little dwelling that was on there.

Q. It was $6,867.75. The first taking reduced that value $3,289.87 on the land value, and $75.00 an acre on the mineral value? A. Which was $11,000.00 and some.

Q. Would you total those and tell me what the figure is? A. Alright, you wanted them broken down that is how I got that.

Q. We will get to that later on. A. That total damage by the first easement was $4,451.62.

Q. To this particular 15 acres, is that what you mean? A. Yes.

Q. That means the remaining value was $1,733.13? A. Yes.

Q. Of the 15 acres after the first easement was imposed upon the whole tract? A. Yes.

Q. You are considering this by the usage, and it doesn't matter whether it is on one acre or on 43 acres, or the whole? You are not farming the farm before and
265 after, you are figuring here the unit before and after?

A. I figured the whole farm to start out with on the first clearance easement. Then that first clearance easement reduced the value of 15.49 acres that was going to be taken in fee.

Q. In other words of this $16,856.00 over here that you said was the total damage to the farm by this taking, you attributed $4,451.62 to the 15 acres. Is that what you are doing? You just divided it by four (4); is that what that is? A. No, that is calculated out.

Q. Do you want to see the figures? I want to understand them. A. It is figured out on the basis of the actual acreage on the basis of this formula, and the minerals added in there.

Q. Are you telling me that your formula applies to fee taking also? A. No, sir, we haven't gotten down to the fee taking yet.

. . . . . .

Further Cross Examination

By Mr. Camp:

Q. You are the same Mr. Wilcox that was on the stand when we last recessed? A. Yes, sir.

Q. Mr. Willcox, at that time if I understood you correctly you had testified that on Tract 118E just before that was taken, that the 60 acre ownership of Mr. Davis had a value of $23,138.00, is that correct? A. I had been using 59.12 acres. A full 60 acres is $23,460.00.

Q. $23,460.00? A. Yes, sir.

Q. You have been using what? A. 59.12 acres.

Q. $330.00 for that .88 acre—for that .88 of an acre difference there? A. Yes.

266 Q. Starting with the 60 acre figure, of $23,460.00, please tell me what the value after the easement in 118E was in the 60 acre tract? A. You want the value that was left, is that the way you phrased your question?

Q. That is correct. A. $9,026.44.

Q. In other words the value of the taking in your opinion was $14,433.56? A. That is right.

Q. Yesterday I believe you said it was $16,856.75. How do you account for that? A. Now, when I was sitting here figuring, that first easement only covered 50 acres instead of 59, which was the figure that I used when I was sitting here, calculating, breaking it down.

Q. On the date the second Declaration was taken, on March 4, 1957, is it your opinion then that hte market value of the tract was still $9,026.44? A. Yes, sir.

Q. You are the same Mr. Willcox that was on the stand

Q. What was the market value of the remainder of the tract after 15 point something acres was taken? A. $6,709.31.

Q. $6,709.31? A. Yes.

Q. And the value of the 15 acres was $2317.13? A. Right.

Q. Now then, of the $6,709.31 that was left in this tract of land at the time the 142E easement was imposed, did that lessen the value of that in any way? A. Yes, sir.

Q. What was the value after 142E was imposed? A. $2,206.63.

Q. And I consider then that Tract 142E was lessened in value by $4,448.68 by the second easement? A. Yes, sir.

267 Q. This $1,357.13 figure that you gave yesterday then is the value of the fee? You weren't taking something else into consideration, is that right? A. Yes, sir, the house that was on it.

Q. Then of the $1,317.13, you attributed how much value to the house? A. $960.00.

Q. Did you know Mr. Davis bought that house for $5.00? A. I heard that somewhere yesterday, or the day before. But he had to move it after he bought it.

Q. And actually you valued that 15 acres, we will not consider the house, at $87.84 an acre, didn't you? A. When?

Q. When you gave the value of $1,357.13 when we took it from the man? A. Well, I haven't figured it out.

Q. Figure it out and see if that isn't correct. According to our calculations Mr. Willcox, this fee taking that you valued, disregarding the building, at $87.61 per acre? A. That is correct.

Q. Is that what you got? A. Approximately.

Q. Now, at the same time that you valued that fee taking where we took all of the title to the land, you valued the rest of the land at $101.96 per acre? A. I wouldn't know the value per acre.

Q. Would you figure it out and see whether we are right or wrong here, this is rather an interesting point. A. I didn't come out like you did.

Q. Didn't you get that the before value of 142E, that area, to be $101.96 per acre? A. Before 142, is that what you meant?

Q. No, after 142 was taken. ~~A. After~~ 142 was taken——

268 Mr. Meacham: The amount of the taking, and what was the value of the land that was left after 142 per acre. Is that what your question was?

The Witness: You are talking about the land value, or my total value?

Q. The before market value on 142E, we will start there? A. Before market value on 142E, the before market value before 142E?

Q. Yes, sir. That was $6,719.33—$6,791.33, that would figure out $150.75. A. That is better now. You said $110.00.

Q. We will get to that. That is a different element, I thought this would help clear it. You value 142E before the taking at $150.75 per acre? A. Alright.

Q. Is that right? A. Right.

Q. And you valued the damage to 142E by virtue of the taking of $4,448.68, or $101.96 per acre? A. That is where you got the $110.00?

Q. Yes, sir. A. That is correct.

Q. Is that right? A. Yes, I haven't figured it out, but I can see that it is approximately correct.

Q. Which would leave an after market value of *$142E* of $50.78, that is what it is worth after the lawsuit was filed on 142E? A. That is right.

Q. Now then, if we go back to the market value of the land after 118E had been imposed upon it, it was $9,026.44, as I understand it? A. Yes, sir.

Q. Or $150.44 per acre? A. That is right.

269 Q. Does that sound right? A. That sounds right.

Q. Now then, how do you reconcile the fact that

this land was worth $150.44 per acre, but when we took the fee the fee itself was worth $87.61 per acre, or only about half of what you say it was worth with an easement on it? A. 15.49 acres was entirely covered by the easement. The total remaining land had approximately—well, the first easement *liked* approximately 10 acres of covering the whole tract of land, so when you come right down to 142E there was still approximately 9½ acres that had no damaging effect from the two previous easements. When you start averaging it that would boost up that average.

Q. Have you figured on that, or is that your explanation now without thinking about that? A. Well, I would say that was.

Q. You haven't calculated anything out that substantiate that, have you? A. The figures are right here.

Q. I know those figures are there, but as I understand it you take this easement that you place on here by your formula, and then you just take it across the area, and multiply it by a number? A. Only across the area affected.

Q. Let's get this down to some figures here on this last theory you propounded on how you break that down, and come out with the fee worth only half of what it was worth with an easement on it. A. Well, in 118E there were 50.25 acres effected, and the average thickness of the air thickness was 42½ feet, and half of $1.00 a foot was $212.00. That was on surface and agricultural value only. That amounted to $10,055.65. The mineral value, I figured, was all gone.

Q. Tell me about this mineral value, did you consider the nine (9) and a fraction acres left there, of mineral value there? A. I figured there was 9½ acres,
270 but 50.25 acres was taken and covered in this easement, so the other 9½ acres wasn't affected by the taking, and it went ahead and carried its original value just the same as this value.

Q. Then minerals on the nine (9) and a fraction acres were not affected by this easement over the 50.25 acres, the value of it was not affected. Is that your testimony? A. The way I went at it, actually there was some affected.

Q. Just which was it, was it or was it not? A. In my calculation I left them out.

Q. You felt they weren't affected then? A. I felt there was, they were sufficiently insignificant not to give them consideration.

Q. At $[illegible].00 an acre times nine (9)? A. Yes.

Q. That is insignificant? A. Yes.

Q. Mr. Willcox, this easement of 32 feet on the north and 85 feet on the south, I believe you testified yesterday that it didn't affect the normal farming operation as far as ability to farm the land was concerned in your judgment. Is that correct? A. Straight farming operation, yes.

Q. That is also true of 142E, wasn't it? A. 142E is getting down there where it could possibly.

Q. Well, it runs from 17 feet to 42 feet. That wouldn't interfere? You have seen it out there, you can still farm it like you always could? A. Yes.

Q. So it doesn't effect the agricultural ability? A. Not for his operations.

Q. For that particular land? A. Not for his particular land, it might somebody else's.

271. Q. Therefore, I would like for you to tell me why you conclude that it was damaged $101.96 per acre by the second taking which likewise did not interfere with the agricultural use of the land? A. That second taking included the mineral value, which wasn't covered under the first one also, so that comes out of that $101.00 you are speaking about. But the limitations, stricter limitations imposed by this new easement again comes into that bracket of an increased limitation by a co-owner.

Q. Now then, this co-owner matter that you have discussed here, you understand that an easement is not a co-ownership in that you have managerial ability? It is just a right to take a limited use of a particular area as defined in the easement, do you not? A. Well, when you refer to managerial ability, the easement sets out limitations, and then the easement provides for the ingress and egress to enforce those limitations and see that they are *bening* enforced, and that is my definition that would be an inclusion of managerial imposition.

Q. You believe—I believe you concluded yesterday for the sum of $200.00 a competent engineer could be employed to advise you how high this easement is above your land? A. That is right.

Q. Now then, if we impose an easement over practically all of his land in the first taking, and most all of it the second taking, you understand it is not imposed over all of his land yet, do you not? A. You mean on this tract?

Q. Yes. A. Well, there is less than an acre there.

Q. Isn't there less than about five acres? A. No. There is a difference between 59.12 and 60 acres.

Q. Would you tell me what additional expense or cost or damage to the amount of $420.00 in the way of this co-ownership matter you are talking about, that was taken in the second taking that wasn't taken in the first taking,
272 and you had already paid him for it once? A. A difference of about nine acres.

Q. About nine acres? A. Plus a difference in the limitations. In other words you drop pretty close to 18 feet, or around 18 feet down from the original taking.

Q. But we have agreed, haven't we, that would not interfere with his farming substantially? He would still farm it and his farming—and he is farming it as he did before? It is still limited to this co-ownership? A. It could limit an improvement in his farming conditions, that 17 feet.

Q. Now then, I will ask you, I believe it was your testimony that this was the most valuable tract of land per acre in this vicinity? A. I don't think I said in this vicinity, I said of the tracts involved.

Q. Of the tracts involved, and of the sales that you observed? A. That is right.

Q. Then how do you reconcile the fact that you only value this land for a mere sum of $87.61 per acre that was taken in the fee, and yet as you said this poorer land which was likewise not only had a clearance easement on it but was of irregular shape, and being only a few hundred feet wide, sold for as I recall $108.00 per acre along beside the Base? A. The damage effected by the first taking isn't going to permit the value to increase. Now, if the value of the original taking is altered——

Q. What was that now, sir? A. I said I think what I said was that the damage originally attributed to this land would reduce its value, so that the remaining value would be the original value less the damage attributed to it.

Q. That was not the question, sir. The question was, how did you reconcile this, which by your judgment supposed to be the best land of any of these sales that
273 you considered, Sale No. 18 and Sale No. 19 on the map, that both of those tracts having—one other easement about 450 feet wide, both of them being about that

wide on one end, one of them a quarter-of-a-mile long, one of them a half-of-a-mile long, you do admit that does impair a farm tract to have it in such irregular shape, do you not? A. Right.

Q. And they also had easements on them, you understood that, didn't you? A. Yes, sir.

Q. And yet those tracts sold for $108.00 and so many cents per acre?

Mr. Meacham: I challenge that statement until we get proof on it, that they sold for $108.00 an acre.

Mr. Camp: He says he knows.

The Witness: I said that was the information given.

Q. $1,500.00 for the one tract.

Mr. Meacham: I think it brought $1,400.00. That is the information I have, we don't have any evidence one way or the other. The figure I have on it was $1,400.00, and $3,000.00 on the other, and those are simply based on records.

Q. What is your explanation, sir, of why you consider this much more valuable land per acre, and was worth less money this way? A. You can put a tract of land like that in the hand of a realtor, and a good one, and he can scour the country—he has all kinds of prospects and clients, some of them will shut their eyes to hazards, but in addition to this tract, these two tracts of land you are speaking of, being out on a paved highway, they are of a length long enough that he can get in there with machinery on the long way of them and not be handicapped quite as much, and cramped in his operation. But this tract is left more or less inside, and it would take a lot of concentrated
274 effort, and after a concentrated effort you might finally find somebody that would pay a little more than I valued it for, but the chances are there is a good reasonable lack of opportunity to find an average buyer interested in that tract after that first easement goes on there. So that you have got to go to a lot more expense to realize a sale value than you did before.

Q. You will admit a square tract has more value than a rectangular tract only 450 feet wide? A. Not necessarily, that depends on the kind of machinery you are going to use. If this little tract, you can get in on it and irrigate it, if you can get a machine in there and drill a well, and I would imagine that you could, you can get in there and

irrigate this little tract if you can get the machinery in there and set it up there long enough to get your irrigation well down.

Q. That is this 15 acre tract? A. The full 60 acre tract, and if you can do that the square tract is worth more than the long oblong tract because of the facilities of distributing the water. But, if you are going to dry farm it, and you are trying to use machinery that you use on an ordinary half section, your long narrow tract is less advantageous.

Q. You are talking about a half section, and we are only talking about a 15 acre tract. A. But it is a half-of-a-mile long, one of them is, and one of them is a quarter-of-a-mile long.

Q. Did you ever in your life before this around this base before, attempt to appraise a clearance easement? A. No.

Q. This is the first one you ever saw, isn't it? A. That is right.

Q. Mr. Willcox, did you realize that when you add up all of the damage that you attribute to this land that
275 you come out damaging this land $301.63 per acre, and have 40 some acres of it left? A. $300.00 and how much?

Q. $301.63 according to our calculations. A. That is not according to mine. You are off $10.00.

Q. Off $10.00? A. Yes.

Q. Which way, sir? A. You are high.

Q. $291.00 then per acre? A. You said $363.00.

Q. No, sir, I said $301.00. Should it have been $356.00? A. Well, what figures are you using? I thought you said $363.00?

Q. And it should have been $353.00? A. That is the total damage. That is right on 60 acres, including the taking.

Q. That is what I am talking about. According to your calculation we were low by $50.00, it should have been $353.63 damage to this 60 acres, and you have 40 some acres left after paying $353.00 an acre damage. A. You have 43 acres left but for the limitation on it.

Q. Let me ask you this, if I understand you correctly, this is the tract that you used as a basis for your theory, isn't it? A. Yes, sir.

Q. I wanted to be sure the Commission heard you, this is

the tract that you used as a basis for your entire theory? A. That is right.

Mr. Camp: I would like to now make a Motion. We would move to strike the testimony of Mr. Willcox for a number of reasons which I would like to cover: First, his demonstrated disregard for actual values. He has demonstrated a lack of knowledge of actual values as to the minerals. He has testified that there were no leases that
276 he knew of in the township, and his only information was that he checked four or five leases starting five miles to the southwest to a distance of eight miles to the southwest, which leases he happened to know about by virtue of his mortgage files with his company. He further testified as to the minerals, that he had no knowledge of the minerals that were transferred or reserved on the various sales that were actually consummated in this area. He was unfamiliar with the minerals on the land involved. He made no inquiry to ascertain mineral values except to Mr. Rainbolt, who he admitted had hedged and finally was of no value in giving him an opinion on which he could work with. His only other inquiry as to minerals was to an unnamed Anderson-Prichard man who Mr. Willcox admitted had no leases in the county, or knowledge of the immediate area involved, and that oil operations in Mr. Willcox's own words "spotty", and that he had no knowledge whatsoever of the immediate area of which we are concerned as to minerals.

He also demonstrated a lack of knowledge of actual values as to the surface. His testimony is based upon a theory entirely conjectural and speculative, being a creature of his own imagination. It conforms to no normal accepted or approved method of appraisal, and in addition is based upon a misunderstanding of the Government's taking. That the values reached were predetermined, and for which he admittedly attempted to find some method to substantiate them, and then totally disregarded local values, and fails to show a value based upon any concrete thing.

Further, that Mr. Willcox demonstrated a lack of actual qualifications to be entitled to qualify as an expert to express an opinion in this case. That neither on direct or cross examination has he laid the necessary predicate or foundation to be considered by this Commission as a com-

petent witness to testify as an expert as to land or mineral values. That he was not familiar with the land in the Declaration of Taking, and had never been on much of it, and had never examined the improvements or the soil, first seeing the tracts in 1958. That his base figure of $300.00 was set on land after its physical character had been changed, the house removed, it had been excavated, and which has been demonstrated was without basis in fact.

277 Further, that Mr. Willcox admittedly never checked any county records for assessed values, agricultural records, nor aerial photos of the tracts involved, is not familiar with them; he did not consider the governmental soil maps available for the area, did not go on the area to make an independent investigation of the soil, did not make an adequate inspection of the tracts or sales, most of which he was never upon, and that his inspection was only begun in 1958. That he has showed apparent misconception of market value, and testified that his value was not only based upon the sale of units of the ownership, but also a mineral value, later to be added together to reach a total value. He also improperly considered the value of the property as it happened to be effected by the managerial ability of the farm operator, which was improper, in that it failed to establish the market value attributed to the real estate, which factor is the only material one for the Commission.

That he failed to *failed to* appraise the estates taken at a before and after market value, and *substracting* an after market value, but admits he applied his private unsupported theory to reach a damage value. That the entire appraisal was based upon a basic value which Mr. Willcox has just now admitted which was based upon a tract of land which he never saw until subsequent to its physical characteristics having been substantially altered, which does not conform. It is basic value on this land to other lands, and therefore his entire theory is unsupported, incompetent, no foundation having been laid in fact for any element to which he applied his speculative theory, and this is true to all of the tracts.

Mr. Whiteside: Do you have anything to say, Mr. Meacham?

Mr. Meacham: All of those things that has been said by Mr. Camp has to do with the weight of the testimony. We will go over those things in detail in our final argument. If the Court is disturbed we will go over them now. As to whether Mr. Willcox is an expert or not, he has testified that he has been in the loan and appraisal business in this county, I think he said 35 years. He has been actively
278 engaged in that business, and that alone makes him an expert.

Now, we get to the details of these various things, some of these things I disagree very strongly with George on his conclusions on the various items of evidence. He has repeatedly stated what the fair cash market value is, what is exactly the proper test; he has repeatedly stated how he arrived at his figures, by subtracting the before and after fair cash market value. As to these various detailed items that George has called attention to, that has to do with the weight, and the weight you gentlemen will give to his expert testimony, and we will discuss all of that in the argument when we complete this hearing.

Mr. Whiteside: The Commission will reserve a ruling on your Motion until the closing of the testimony.

Examination by Mr. Tisdal:

Q. Do you make loans in this county? You stated you made loans in this county as well as this part of Oklahoma? A. Yes, sir.

Q. Just what fact, what would a general easement like this have in procuring a loan on a farm like that out there? Just how much will there be in damage? Will there be any question arising in making the loan, and how much? A. I would say this, from the standpoint of making a loan on a tract of land covered by the easement, that scares—well, that as far as my company would be concerned, our legal department would reject it. If the tract of land involved had only a small portion of the acreage under such an easement that they would view it and consider it based on the relativity of that acreage involved to the rest of the acreage involved. If there was a substantial acreage out from under it, they wouldn't consider it too hazardous and they would consider the loan.

Q. Do you know a case of leasing for oil, oil companies,

whether active or not, such as in this part of the
279 country, would there be because an oil company holds a lease on it, does that particularly mean they are going to drill right in this vicinity or anything like that? A. No, the lease is held as a protection against future possible reserves. Now, basically the lease says it will be active up to the time of one year, but if drilling does not occur within that one year period then it commands a delay rental, and it is usually set out on a specified term of 5, 7 or 10 years. I have seen it even run higher than that.

Q. In other words an oil company would lease that, as your statement is if I understand it right, it is more of a protective lease from the other companies or what? A. It is a protection against the possibility of other companies coming in there and then all of a sudden they drill something, and another company comes in and buys a lease alongside, to give them protection in the event such a thing should occur. But where there is strictly an inactivity in the area they will frequently come in and lease a block, or they will checker-board an area, if they have some geological indication that somewhere down the line in the distant future that they might desire to develop that particular area.

The simple fact of taking a lease does not mean that they are going to drill a well there in any reasonable time.

Q. In your judgment in the case of Mr. Guthrie here, where he leased this last year, would that have any indication of bearing on the value of the land, or the minerals, to the fact that his possible royalty or minerals are valuable in there from the standpoint of them leasing? A. That particular lease sale could mean a bunch of things. The first thought that would occur to you is that somebody has sufficient knowledge of geology, or think they have in that area, that they are willing to take a gamble of the extra expense and the extra details, and hazards of going in there under this easement, and the possible necessity of going to some extra drilling expense to develop the possibility of that geological formation being satisfactory.

280 Q. One other question I didn't get clear. Just what effect these general easements has on a place as to the value of the general easement over it, in place of taking an easement itself? A. You are talking about an easement for pipe line, or roadway?

Q. No, this particular type of easement. What would you say that the damages—what would you say that it damages would be, such has a general easement would be to any farm, not any particular one there, but on any farm—a general easement taken on it? A. You are talking about all of them. You are talking about a general easement where the height is all the same on all of them?

Q. Yes. What I mean is—— A. Just a fact his easement is on there, regardless of what the limitations are?

Q. Yes, from the value of sales standpoint. A. It is quite a factor there, quite a damaging factor, and again I come back to the thing that the general easement affecting a tract of land is dependent entirely upon its limitations.

Let me use a pipeline easement. If a pipe line easement is in the ground, as I have seen some of them, six inches under the ground where every time you have to go over that pipe line you jump the plow over, that is a pretty difficult type of thing to do, and it is a hazardous easement. If that pipe line is laid down two feet under the ground where you can conduct your normal agricultural program without consideration to it, and the only thing that you have got to be concerned with which is a later damaging fact, is that the thing might explode sometime. That is a separate thing. But where that limiting factor is down under the ground there where it is out of the way, it is going to have a relatively lesser percentage of damage to the title.

Now then, on this type of easement out here, you could get up here above, we will say 200 feet, if you took an easement there it would be a limiting factor in the title
281 there, but it would be above a point of possible damage except some very remote thing, and then all it would be would be of a nuisance value up to maybe 200, 300 or 400 feet to the tract of land. And as you get down down below that, say——

Q. Just a general easement. That was the point I was wanting to know. Anytime you slap an easement on a place for sale purposes? A. It is a damaging factor.

Q. Is it worth $50.00 or $1,000.00, $2,000.00, or what? A. I would say it was worth probably, if it covers a tract of land it is probably worth, just the fact there is an ease-

ment there, we will say five percent (5%) damage to the tract of land.

Q. That is what I wanted to know.

Further Cross Examination

By Mr. Camp:

Q. Of course, Mr. Willcox, you didn't apply that five percent theory to your case. You applied something like 50%, or more on these tracts? For example on the first one you started out with $52,000.00 and a damage of $37,000.00. A. Five percent is included in that. You see a straight easement is just an easement regardless of what it covers. Now then, when your easement includes limitations and for limiting factors then that element comes in there to increase the five percent basic damage, and I just included that in the overall area.

Q. But I think we agreed for example on Guthrie, that this height of 71 feet to 163 feet didn't interfere with what his highest and best use of his farm was, general agricultural value, you stated that yesterday? A. The agricultural value, but it does affect the mineral value.

Q. You recognize the fact that he leased it though last week, and so you still contend that he can't do that? A. No, I didn't contend he couldn't.

Q. You said it didn't have any value? A. I said his mineral value was damaged.

282 Q. Totally? A. Yes.

Q. Now then, we agreed yesterday that all above 60 feet wouldn't interfere with the normal farm operation, and all of this man's is above 60 feet. It goes on out to 163 feet?

Mr. Meacham: This is just repetition of the same thing we have been going over now for a day-and-a-half.

Mr. Whiteside: I believe that is right.

Examination by Mr. Tisdal:

Q. What I had reference to and what he had reference to there, what I was wanting to know what effect on a sale value an easement regardless, any kind of a little easement, I was thinking of that and that is what I had reference to. I wasn't thinking of any particular thing.

Mr. Camp: I would point out that this has seemed somewhat tedious, but we must bear in mind we are trying 10 cases in effect here, all in a couple of days, and therefore I think that it does bear considerable inspection by all so that we don't become lost in the entanglement, and come out with only considering one or two of the whole instead of all of them.

Mr. Gillespie: I am sure we all appreciate that, and there is no limitation—there is no indication here on the part of the Commission for limitation.

Further Cross Examination

By Mr. Camp:

Q. Mr. Witness, you have stated under examination by Mr. Tisdal that your company would reject a mortgage. Can you tell me of a specific instance where you have? A. No, sir.

Q. You are telling what you think they might do? A. Yes, sir; based on my recommendation.

283 Mr. Camp: That is consistent with your position here, therefore you don't know, and therefore it would be speculative what they would do, and we move to strike that portion of his testimony because that is contrary to what other mortgage companies would do, and which land is covered by mortgages recently.

Mr. Whiteside: Overruled.

Examination by Mr. Gillespie:

Q. I realize this is just one of the many elements. Based on your statements here this morning Mr. Willcox, for instance on this Merz tract which has a 13 feet ceiling on the south side, and 50 feet at the center, and 70 feet on the north line, in your opinion would it be possible to secure a farm loan on that particular farm? A. I would say no.

Q. You mean, if this one security was all? A. Just that one tract of land I would say 'no'.

Q. That is all.

Further Cross Examination

By Mr. Camp:

Q. Did you know the Merz had a loan on their property? A. Before or after?

Q. Presently? A. If it is on there you can't get it off, and they might get it from an individual. I was referring to a recognized loan company.

Q. It is my understanding that Prudential has a $10,000.00 mortgage on the Merz farm, which was begun on February of 1954 and is still in existence, had 20 years to run. Is Prudential a recognized mortgage loan company? A. Yes, sir; but that is before the date of the easement, isn't it?

Q. Do your mortgages ordinarily have some clause in them that if your security is impaired that you can do something about it? A. If they know something by having been served a summons on condemnation proceedings, yes. Every once in a while the Court slips up somewhere.

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Mr. Meacham: Prudential isn't in this lawsuit.

Q. Our records do reflect Prudential was made a party to this suit. A. I don't know, I know Mr. Pounds knew of the suit and expects to be made a party to any settlement.

Q. Who is Mr. Pounds? A. He is the State Representative of Prudential.

Q. According to my records on application of Prudential after being served, the Court has dismissed this defendant from the lawsuit as not affected?

Mr. Meacham: If that is your information it is wrong, because the money was paid to them together with Merz'.

Mr. Camp: That is probably right.

. . . . . .

Defendants Rest

Mr. Meacham: Landowners rest.

Mr. Camp: I don't think it is necessary, but I would like permission to renew certain of my Motions made at the beginning of the case.

Mr. Whiteside: Alright.

CARROLL V. SIDWELL, of lawful age, called as a witness on behalf of the Government, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

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Direct Examination

By Mr. Camp:

Q. Would you state your name, sir? A. Carroll V. Sidwell.

Q. What is your occupation? A. At the present time I am a consulting petroleum engineer and geologist.

Q. Where do you live? A. Tulsa, Oklahoma.

Q. How long have you lived in Oklahoma? A. Since 1911.

Q. Do you do appraisal work? A. Yes, sir.

Q. What is your educational background and experience to qualify to do appraisal work, sir? A. I graduated from the University of Oklahoma in 1923 with a degree in Geology. I did graduate work, and taught geology the following year. In 1925 I became employed as a subsurface geologist for the Atlantic Refining Company at Tampico, Mexico; from 1925 to 1928 I was employed by the Pan American Petroleum as a subsurface *geoligist*, and later general superintendent of drilling and production. In 1928 I became employed by Amerada Petroleum Corporation as a petroleum engineer in Oklahoma, Kansas and North Texas. I remained in that employ until 1936, at which time I became General Superintendent of drilling and production for the British American Oil Producing Company, and among other things during that employment we drilled and produced 55 wells around the Capitol in Oklahoma City. We completed a number of wells in Montana, East Texas, Texas Panhandle, and other areas. After the employment by the British American I entered into a contract with 38 oil companies in Oklahoma City to make a subsurface study of the *Wilcox* sand area in that field as to the possibilities of secondary recovery of oil and gas. After the completion of that contract I became self-employed in general consulting work, and about 1940 did the first work that I ever done for the Government in connection with the appraisal of subsurface or mineral

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interests. In that case was with particular reference to Lake Texoma in Southern Oklahoma.

Q. What size project was that? A. 195,000 acres. Subsequent and during, between the time I became self-employed, and was later employed by the University of Tulsa in 1945. I was employed by a number of individuals and oil companies in addition to the work that I did for the Government. In 1945 I became employed by the University of Tulsa as Professor of Petroleum Engineering, and head of the Department of Petroleum Production. I remained with the University until 1954 as professor of petroleum engineering, and the last two years was not head of the department for the reason that I took a leave and went on half time employment. During that time I continued in private practice, with permission of the University, and acted at various times as consultant to the Army, in one instance the Navy, and various other governmental employments as consultant and appraisal work, and litigation.

Q. Did you evaluate the minerals under the Osage Nation? A. I evaluated the damages under the Oologah Dam, and as Chairman of a Committee of three—the committee consisting of myself, and a representative of each of the Department of Interior and Department of Army, to establish the damage to 1/6th mineral rights of the Osage Tribe.

Q. Who authorized the Committee? A. Congress.

Q. Have you had further experience? A. Upon retirement from the University I have been in consulting practice, and as a consultant primarily for the Department of Justice, and the Department of the Army of the Federal Government. I am a member of the American Association of Petroleum Engineers, I am a registered professional engineer in the State of Texas and Oklahoma, and have a Certificate of Registration with the National Bureau of Engineering, which will permit me to practice professional engineering upon application in any of the present 50 states.

287 Q. Have you made *apprisals* in Texas? A. Yes, sir.

Q. How many federal district court cases there have you made appraisals in? A. Well, in one reservoir project, the

project consisted of 1325 tracts of which there were 1,100 in condemnation approximately, due either to title or outstanding mineral interests, and I have appraised all of those tracts. I have a contract at the present time on another reservoir, jointly with consulting geologists in San Antonio, Texas, where we are appraising the minerals under an entire reservoir consisting of about 70,000 acres. I have appraised mineral values for clearance easements at the Perrin Air Force Base, and—that is at Big Springs. I have in Louisiana appraised the subsurface or minerals at that time under tracts either condemned or to be condemned at Barksdale Air Force Base; I have appraised the subsurface or mineral estate, before and after the taking, in numerous condemnation cases in North Dakota, South Dakota, some in Kansas, and some in Arkansas.

Q. You made appraisals in most of the reservoirs being constructed in this area? A. Yes, sir; including the appraisals as I mentioned in Lake Texoma, appraisals for the Department of the Army on the Oologah Reservoir in Northeastern Oklahoma; Keystone Reservoir about 20 miles west of Tulsa.

Q. What size projects were those? A. I can't recall the exact acreage in Oologah, it is something like 60,000 or 70,000 acres total, and Keystone is 130,000 or 140,000 acres as I recall.

Q. Have you made any appraisals on Foss or Cobb Creek projects? A. I have made appraisals for the Bureau of Reclamation on both Foss and Cobb reservoirs.

Q. Where are those? A. Fort Cobb Reservoir is near the town of Fort Cobb on the Washita River, and the Foss Reservoir is out here north and west of Foss City, also on the branch of the Washita.

288 Q. Not far from the Air Base? A. That is correct.

Q. Government's Exhibit 11, Mr. Sidwell, is that your registration and the summary of your employment and so forth, and qualifications? A. Yes.

Offer in Evidence

Mr. Camp: We ask the admission of that for the consideration of the Commission.

Mr. Whiteside: It will be admitted.

Reporter's Note: Government's Exhibit 11 is attached to the original copy of the Transcript.

The same being difficult of reproduction, a copy thereof is not shown in the copies of the Transcript.

Q. What is that Mr. Sidwell, Government's Exhibit 11? A. Government's Exhibit 11 is a photocopy of a certificate from the National Bureau of Engineering Registration, to which I have added the supplemental experience. That was not on the Certificate at which time it was approved in 1954.

Q. Now then, Mr. Sidwell, directing your attention to the area concerned in this lawsuit. Have you made a study of the geology and the general market values in that area as they relate to the mineral values? A. I have.

Q. Would you tell the Commission what you have done in that regard, what you have considered? A. Well, my experience on this particular Air Base goes back several years in appraisal work for the Department of the Army in connection with the acquisition of certain tracts of which three are in this present lawsuit, and in making a study at that time and since, and up to the present time I have examined all of the county records that have to do with the recording of transfer of mineral leases, mineral interests, oil and gas leases, the date of leasing. I have examined the records of the National Oil Scouts and Landmen's Association, and annual records.

Q. What is that? A. That is an annual record prepared by the National Oil Scouts and Landmen's Associa-
289 tion which records annually all of the leasing activity by blocks, all of the exploratory wells drilled, and the results of drilling those exploratory wells in all areas in the United States, including Washita County. I have examined and determined to my own satisfaction the results of previous drilling in the general area of these subject tracts. I have examined the general nature of the closest production to these subject tracts, I have examined both the county records and have determined by sources of information either directly from the oil company or otherwise, the bonuses and rentals paid. The County Records always disclosing the rental under the leases, but very seldom disclose the bonuses to be paid at the time the lease was taken. I have made an examination of the leases, and the bonuses paid in this area, and immediately adjacent to the subject tracts since 1948, including the more recently leasing as of the early part of this year and in 1958.

Q. Did you——. A. I have examined the records and have been furnished title by the Department of Justice as to the interests in the minerals in the subject tracts that are in litigation.

Q. Have you read the Declaration of Taking? A. I have read the Complaint, the estate taken in the subject surface or the mineral estate as disclosed by the Declaration of Taking, and have used that as a specific guide, with the use of all of this assembled, and studied it to arrive at an opinion as to the fair market value of the interests in litigation, or in Court here, before the dates of taking in March of 1956 and in March 1957, as it applies to certain tracts, and have used all of the information generally mentioned, and specific information on the particular tracts to arrive at an opinion as to the fair cash market value of the estate taken in the minerals before and after the date of taking.

In other words the fair cash market value of the minerals, or the interests after the taking at the two different dates.

290 Q. At the time the Declaration of Taking was filed was there reasonable probability of drilling or exploring for oil and gas on the tracts involved in this suit? A. There was not.

Q. Was there in the close *proximidity*? A. There was no indication of actual drilling in or near the subject tracts, or in this area. Most of my information is confined to this particular township, and the interior sections in Township 11 North, 19 West.

Q. Why? A. For the reason they are two deep tests that have been drilled in this area to the south had quite a bearing on the general activity in this area. There was a discovery of an oil field known as the Elk City Oil Field in 1948 some 20 miles to the west that had a tendency to create excitement in this particular area of the Air Base. Quite a number of companies took scattered leases in the area, north, west, south and east of the Air Base in 1947, 1948, and some in 1949. In 1952 towards the middle of the summer the Shell Oil Company on a block of acreage which they had near the northwest corner and around the northwest corner of Section 6, or Township 9 North, 19 West, in Section 6, and in an area around that which would be at the southwest corner of this map, in which they had a block of

acreage and proceeded to drill a well which was drilled.

Q. At this time let's examine Government's Exhibit 10. Would you tell the Commission what this map is? A. Government's Exhibit 10 is a township map of Township 10 North, 19 West, Washita County, Oklahoma, which was made by the Mid-Continent Map Company that purports, and as far as I am able to determine, does show the old leases, and I say old leases that was in existence either prior to or at the time of the Declaration of Taking in 1956. The date of the map is August 1959, and the information on the map is up to July of 1959. And on this map as a base I have circled in the NW ¼ of Section 35-10-19. At this point I have a red circle which shows the location
291 of a well drilled by the Calvert Drilling Company in 1952, to a *dephth* of about 11,000 feet, and at that *dephth* Phillips Petroleum Company took the well over and deepened it to 11,519 feet, and later plugged it as a dry hole in the latter part of 1952.

Q. For the benefit of the Commission, would you outline there where the base is on the map? A. The Base is not in too heavy of a line, but the Base is up here in Sections 9, 10, 11, 14, part of 14, 16, NE ¼ of 16, and then the present south end tracts are down here in Sections 22 and 27. The Merz, Guthrie, and Kerkoff tracts are on the north side of the Base and up to the township line. In addition to the dry hole that was drilled, further as to explanation of this map, I took the map itself and in addition to the dates of exploration—I mean in addition to the dates of expiration of various leases shown on there by Midcontinent, I checked the records of the county to determine to my own satisfaction first, whether some of those old leases had been released of record, whether they expired by their own terms, or whether the companies dropped them, and on this plat I have shown in red what, to the best of my information are the leases that were in existence either immediately prior to or immediately after the two dates of the Declaration of Taking. The dates of the leases themselves in the individual case explaining whether or not they were in existence after the first taking or after the second taking. In addition to that I have tried to ascertain from the records and from the Midcontinent's information, and various other sources, particularly the records of the county, as

to the leases that have been taken in this area subsequent to both dates of taking, and the old leases I have shown on this map in red, the new leases I have shown on here with a blue rectangle.

Q. You are talking about those rectangles on that map. Those cover the entire area that was under the lease, or just a little rectangle put in a quarter or half section to show it effects that? A. The rectangles are all the same size irrespective of the size of the lease, and are on
292 the ownerships which in most cases are 80 acres or quarter sections.

Going back to the wells, I have mentioned the Phillips Well. The Shell Well, that was drilled about the same time and completed about the same time as the Phillips Well.

Q. What was the date of these wells? A. 1952. They were both completed in the latter part of 1952. The Shell Well is in Section 6-9-19, which is off the Southwest corner of this Township Plat. Shell had a block of leases, they started to drill in the summertime, and I have a record of the drilling dates, and completed sometime in the summer of 1952, a small gas distillate well after drilling to a *dephth* of 12,500 feet, and plugged back to about 11,566 feet and proceeded to produce that gas distillate well. It was very small, it was originally recorded as a 45 barrel distillate producer.

At the time of the first taking in March of 1956 of the tracts under consideration here, the Shell Well was producing somewhere between 3 and 5 barrels a day, there was no average, and they hauled the oil away month after month in small quantities as Shell had to do to maintain their lease, and that was the principal purpose of maintaining that well. I believe that the well is still in existence. Now, the Shell people subsequent to that well, and after this date of taking, and sometime in the last two years has, at least my information is, that the Shell have dropped their leases for the most part around that well, and that other companies have subsequently leased them.

In connection with the Phillips Well here that was completed in 1952, and being in this township, it had a material effect on the general leasing activity in the township, in my opinion. That is the way it always goes when a well like that is drilled or is anticipated to be drilled, there is a greater interest and higher prices are paid, bonuses

for lea[illegible] in the general area of teh prospective well than they are generally paid after the well is completed as a big deep dry hole, and I thiñk that statement would apply to any area. Now this area, geologically, as far as development is concerned and a number of other factors was what we would call a "Wildcat area of development" in Washita County. The closest production is
293 some 6 miles from the small Shell well. The Elk City Field some 20 miles to the west has no bearing whatsoever on the specific geological conditions, the leasing conditions, the drilling and development conditions in this particular township for the reason, in my opinion, it is too remote to be considered, and my consideration is and the basis for trying to arrive at a before and after figure on the subject tracts, in my opinion in arriving, in order to appraise mineral interests under the taking of a clearance easement and the mineral interests—may I with your permission take time to explain just one thing? We use sales the same as the surface man does, or try to use them, the bonuses and the terms of the lease, and all, and the amount paid for the lease at a specific time is one of the factors that enters into what the fair market value is before the date of the taking. Where we use sales, the peculiar nature of the minerals because of their change in value from time to time dependent upon conditions of drilling, and the interests of various people, the values fluctuates different entirely from the land values which are pretty well fixed once a person buys a farm and develops it, it has a specific value based upon use at any particular time. But mineral values are sort of jumping around all the time as to values, so in order to explain some of the factors that have to be considered in a mineral appraisal would be the sales have to be in close *proximidity* on the date of taking. Sales that are remote, 6 or 7 years, or 5 years or 3 years, as in the case of a sale of real estate are not applicable. Sometimes they are, but it depends upon the circumstances.

The general geology of the area on the subject tracts and the surrounding area that are under oil and gas lease has to be considered. The geology, generally speaking here, is somewhat different than in the Elk City Oil Field, as evidenced that the Elk City Oil Field is a prolific producing field in this part of the state. So summing up the things that are required in a mineral appraisal as against a sur-

face appraisal, we have to have sales in close *proximidity*, we have to have similar geology, we have to have the idea of the bonuses in the specific area, or in this
294 case close to these subject tracts. What people paid 7, 8 or 5 miles southwest of this, or any other area, has no bearing at all upon the market value of the minerals before or after these subject tracts were imposed with the easement. In other words when you get out of the ball park you can pick up any kind of value, depending upon production and all. I will agree with Mr. Willcox, when you get 7 or 8 miles southwest of these subject tracts you are dealing with a higher and different type of minerals than you are in the area of the subject tracts.

Q. Government's Exhibit 12, what is that? A. Government's Exhibit 12 happens to be a map which I purchased from the All State Map Company in Fort Worth, Texas, which is a general map of Southern Kansas, the Oklahoma and Texas Panhandle, and Western Oklahoma, and placed upon it the wells that have been drilled in all of those areas to show the general structure, substructure surface in what is known as the Anadarko Basin, of which this area would be on the southwest part of it—southeast of the Anadarko Basin.

Q. Is that one of the things you took into consideration, the geology, and studying this? A. I did.

Q. Did you consider the value, the bonuses that were paid on the leases outlined on Government's Exhibit 10? A. I considered the bonuses and the rentals on Exhibit 10 as one of the factors considered in order to arrive at a fair market value before and after the dates of taking.

Q. Did you make inquiry of people who were in the business of buying and selling leases? A. I did.

Q. What inquiry along that line did you make? A. I made inquiry in 1956 of the several companies that had leases in and close to these subject tracts, namely the Peppers Refining Company that had a lease at that time on the Guthrie tract, the Kerkoff tract; I made inquiry from the Sunray-Midcontinent Oil Company on leases in which they held in three-quarter sections immediately north of Township 10-19, and specifically one of those leases
295 was on the SW ¼ of Section 34-11-19 on which they had a lease taken in 1953. In the Sunray's three

leases in that township, and immediately north of the base were taken in 1953, and the bonus of $7.50 an acre were paid, and one of those leases was on the tract of Mr. Guthrie, which he purchased, which is the SW ¼ of 34, and as far as I know that lease is still in existence. At least I have not been able to find it released of record.

Q. Are you familiar with the usual and customary terms of the leases used in this area? A. I am, and the leases for the most part used in this area at the time of the taking of the old leases in 1947 and 1948, the leases generally did not—well, we will put it this way, the leases are the same as the present time with all of the clauses with this exception, the new year leases and the leases that have been taken the later part of 1958 and the early part of 1959 in Township 10-19 by the Kingwood Oil Company contain an additional clause which we call a "pooling clause", and the Kingwood leases provide for pooling up to 640 acre spacing if, or in the event of discovery of gas, or gas distillate. And it is generally accepted, and the oil companies actually do where they have pooling clauses, they have the right of assembling different units for development purposes based upon the contract they made with the landowner, and they can do it without having to go back to the landowner and getting his permission to put his in with somebody else's in order to drill it. The usual pooling that I know of that has to do with this type of lease, generally speaking, does not exceed where you have oil and gas production, doesn't exceed 80 acre spacing. In many instances 40. In the deeper drilling, and it is evidenced by both the Phillips Well and the Shell Well, those wells were both spaced in the center of 40 acres. People just do not, or companies do not, since it costs so much to drill these 10,000 or 11,000 foot holes want to start out with a spacing of less than 40 acres generally. Shallower drilling in shallower area,
296 where where you get smaller production or smaller expected production, there are a lot of wells in Oklahoma in past years have been drilled on 10 acres, and that is standard, and all the spacing starts from that.

Q. What other consideration did you take into your study here to arrive at the value? A. I took into consideration the expiration dates of the old leases, and for the most part *mose* of the old leases in this Township 10-19 expired by

their own primary term. In other words they were 10 year leases for the most part, and the most of them ran 10 years. The new leases are 10 years, and they have been taking them the last two years, so they run until 1968 or 1969 provided that the rentals are paid.

Now the payment of rentals on oil and gas leases, irrespective of the term, or between what parties, is not a certainty. The lessor is certain as to the first year, and after the first year it is entirely up to the lessee as to whether or not he continues that or drops it, and he can drop it at will or he can pay his usual $1.00 an acre rental and keep it to another year. Failure to pay the lease drops it.

Q. Based upon those considerations is it possible to capitalize the value of the minerals as Mr. Willcox testified? A. Under no circumstances imaginable.

Q. Why? A. The first thing is that you can not capitalize an uncertainty, and the uncertainty is a 10 year lease with $1.00 an acre lease, not knowing how many years that company would keep it. If you assumed that the company was going to keep it 10 years you could capitalize the $10.00 rental, but the chances might be pretty good you would be in error, at least you would be in error at that specific time. That is not the method of capitalizing rentals as a fair cash market value as to what that lease is worth. The bonuses, yes, they are a measure of the fair cash market value at a specific time, but the bonuses itself change. For that reason you can not capitalize it, the man gets his bonus as of a specific date. He gets it when he signs that lease, and what there is to capitalize on that I just can't figure out.

297 He has got the money, it is not some future money he is going to get. He got it today. Unless I am in error, and I stand to be corrected, if we are going to capitalize something we are going to set it up so much money now, and we are going to get so much more money down the road, and we discount that down to it. What that future money is today I don't know. That is not the case of these bonuses, because the landowner gets the bonus the day he gets the rental, there is nothing to capitalize.

Q. He sells an interest at that time? A. He contracts away 7/8ths of his rights to the minerals usually. That is the usual term, he reserves 1/8th royalty, and he sells that

7/8ths. He has lost any control over it whatsoever as long as the lease is in full force and effect by payment of rentals or drilling.

Q. I believe you stated you were familiar with the terms of these easements, and that you also were familiar with the application of the terms of the easements at other Air Force Bases, is that correct? A. Yes, sir, I did say that.

Q. What has been the effect in your study of such easements? A. The effect on what estate?

Q. The minerals. Q. The effect on the minerals on other bases of which I have worked, has been that where the company could develop the minerals undrestricted with the easement.

Q. What do you mean there? A. Well, I mean if the clearance easements are such they could get under it and develop it under the clearance easement, that the value of the taking has been at a very low figure, because of the ability of them to develop the thing. As far as restrictions that prohibit the development in activity, or in active producing areas, then the question resolves itself down to what the oil company has lost, if they can not drain the speculative oil under those easements then it becomes a question of what and what amount they have been damaged.

298 How much have they lost by failure to be permitted to drill. In the case of "wildcat areas" where the minerals might have a trading or speculative value at any particular time, the amount of detriment to the interests is certainly as much less than areas where you are dealing with oil and gas production. Actually in both instances, Perrin Air Force Base at Sherman, Texas has production at the south edge of the base. The oil company was prohibited to drill. The topography went up where there was a hill three-quarters of a mile south of the end of the runway that kept getting closer and closer to this glide angle plane, and there wasn't any place to put a well.

In the north side of the base which had the less valuable minerals because development had proven there wasn't any oil and gas production up there, the topography dropped off rather abruptly where you could get a derrick under there. They did subsequently drill two or three dry holes in that area. If you can get in and develop it, the affect of the easement is nill on the effect of the minerals. If you can't

get in, then you have to appraise it under the circumstances which you find it, in my opinion.

Q. Applying this study and this information on Tract 104E, the Merz tract, have you arrived at an opinion as to the mineral value under that tract before this easement was imposed? A. I have.

Q. And what is that figure, sir? A. That figure is $30.00 per acre.

Q. Times 160 acres? A. Or $4,800.00.

Q. And what is the fair market value of those minerals after this easement has been placed upon it? A. My opinion the fair market value of the minerals under the Merz tract, or the remaining value of the minerals after the easement was imposed in March of 1956 was $5.00 per acre, or a total on the entire tract of 160 acres. I will explain why I used 160

Q. We will get that next. That would be $800.00 as the remaining value? A. That is right.

299 Q. Or a total depreciation or the value of what we took of $4,000.00 for his minerals? A. That is my opinion, that is it.

Q. Would you explain to the Commission why that you valued those minerals as you did, before and after, and why you took the whole tract instead of portions of the tract when this easement does not cover all of the tract? A. On the first, as to method of arriving at the fair cash market value of the minerals before, that is an opinion figure based upon all of the various studies and examination of the various records, the drilling activity, the leasing activity and all of the factors that I mentioned as part of this study in order to arrive at a figure. That in my opinion the fair cash market value of the full mineral estate under the Merz tract as of the time of the taking was $30.00 an acre, and that same figure applies to the other tracts at the north end of the base, based upon bonuses, rentals, leasing activity, leases in effect, lack of drilling activity, lack of production, similarity in geology between these tracts and the tracts immediately surrounding that were under oil and gas lease on which bonuses had been paid, and on which they were active leases. I considered the entire tract of the Merz brothers to have diminished in value in the amount of $25.00 per acre did to the fact that

remaining land after the easement was taken, which was not covered by an easement or any other type of taking, consisted of two narrow strips, one along the east side and one along the west side of the easement of 138 acres, and that those two areas—the one on the west side is 25 acres, it was the difference between 138 and 160, that is the amount of acreage that is in those two strips, while you could actually put a derrick on those, you could actually drill a well without interfering with this clearance easement, the location would have to be closer than 330 feet.

Q. 330 feet to where? A. The roadway, or the center line of it—the property line in the center of the roadway.

Q. What significance does this 330 feet have? A. That has to do with spacing by the Corporation Commission, and general accepted practices. Under no circumstances do I ever recall a wildcat well that I have ever located or had located myself, or located by some other company, in an area such as this, closer than 330 feet to a property line. That practice is accepted by the industry. While you could get a derrick in there it would not be practical to try to develop the Merz tract with a derrick on either of these two strips.

Q. Then how does it have a residual value? A. It has a residual value of $5.00 an acre in my opinion, because of the fact the Merz brothers still own the minerals, that is one thing.

Q. Did unit and pooling agreements enter into your consideration? A. Yes, I have considered the fact if this happened to be an area where a well was drilled, that happened to be gas or distillate production, and we will assume for the sake of discussion that well was drilled on the next property, or in the center of the quarter section immediately west of the Merz tract, that the oil company having leases on those would probably have these 640 spacing leases, and the Merz tract would participate if it was pooled or unitized.

The Government as I understand it, in this taking did not acquire any of the Merz brothers' interest. They did do something because of the difference in elevations of 13 feet at the south line, 50 feet in the center line and 70 feet at the north line, the difference in the topography, and the glide angle plane, did prohibit the putting of a rig

of sufficient size in that area that would permit the development of the Merz lease by itself.

Q. Now then, if you would direct your attention to the Guthrie tract, 106E, and I would call your attention to the fact that the lessor's mineral interest only remains. The lessee's portion has previously been disposed of and is not before the Court, therefore confine your values to that which is before the Court. Would you have an opinion as to the value, I believe you have already stated that
301 you had a before opinion of $30.00 an acre on this tract? A. That is correct.

Q. And how do you divide the value of $30.00 per acre, or do *pou* divide it between the lessor or landowner as it is in this case, or the lessee? Does that mean that the interests of Mr. Guthrie is $30.00 per acre, or is that $30.00 for all of the interests in the tract? A. Well, I have generally accepted it, and I believe it is generally accepted in the industry that although the oil and gas lease existed upon this tract or any other at the time of the taking, or at the time of the appraisal, consisted of 1/8th royalty retained interest in the landowner and 7/8ths leashold interest acquired for a term up to 10 years by the lessee..

Q. And is that the case in this instance? A. Yes, sir; that the value of the lessor and lessee interests at the time of taking were equal. In other words, I believe that the 1/8th royalty that Mr. Guthrie had and owned at the time of this taking was worth just as much, had the same fair cash market value as the interest of the lessee, or the oil company.

Q. Is that because he has the expense of developing? A. That is one of the considerations, but you might state it in reverse. Mr. Guthrie can do anything with his royalty he wants to, he can buy and trade in royalties in that portion, and the oil companies very seldom trade a leasehold interest. The oil company retains at the time of taking, in my opinion, their interest and the split should be on a 50-50 basis.

Q. As a matter of terminology, I believe you said the Guthrie interests was a royalty interest? A. That is right.

Q. What is the distinction? A. Mr. Guthrie owns 160 acres which 106E is a part of, and Mr. Guthrie before he leases it to anybody owns all of the land and all of the minerals, we call it fee simple title. He also, for what it

is worth, owns all of the estate which might be a
302 clearance estate above that land. He devises or sells part of his interests in the minerals, and if he sells those under a lease term which is a reversionary right after the lease expires, his interests retained would be what we call a royalty interest. If he had sold some of his mineral interests off prior to the leasing, it was not leased, the terminology would be a sale of a mineral interest. But it becomes royalty and subservant to the rights of the lessee's 7/8ths interest once he has contracted that. He has contracted away that 7/8ths interest and then we call it royalty.

Q. It is my understanding that you valued Mr. Guthrie's royalty interests at $15.00 per acre to the total of 160 acres? A. That is correct.

Q. Or a total of $2,400.00? A. Prior to the taking, prior to the imposition of this clearance easement in March of 1956.

Q. What was the value after the imposition of this clearance easement? A. In my opinion the value after the clearance easement was imposed upon Mr. Guthrie's interest, as I understand that is the only interest involved here, was $1,900.00, or a difference of $500.00 diminution in value of the Guthrie interest before and after the taking.

Q. Would you explain why there was not a total damage in this tract as there was in the previous tract? A. I will try to. The Guthrie tract is north of the Merz tract. The clearance elevations are entirely different than they were on the Merz tract. The Guthrie tract at the south end of the tract has a clearance of 71 feet, and on the north line and particularly near the north center—center of the north line, the clearance is something in excess—we have agreed I believe it is 163 feet. Under those clearances there are a part of the Guthrie tract that can be developed without any hindrance from the clearance easement. I considered there were 40 acres of the Guthrie tract, the Southwest 40
acres, that under the clearance easement imposed
303 that can not be *deveoped*. I put a damage on that of $25.00 an acre and he has $5.00 an acre remaining value on that 40 acres, or $200.00 after the imposition of the easement.

Q. The value on the 120 acres that could be developed, you placed the same value as before, so that by taking the total 160 acres at $30.00 an acre and taking out 40 acres at $25.00 an acre, or $1,000.00, for the total interest, or half of that for Mr. Guthrie's interest we arrive at a figure of $500.00 as the difference in value, and it is on 160 acres, the difference in value before and after the date of taking? A. Yes.

Q. In connection with that have you studied the contour maps that are in evidence? A. Yes, sir, I have a copy of them. I have had them for sometime.

Q. And you have studied them and have come to the conclusion that the remainder of the tract would still be subject to ordinary development? A. And I was happily surprised to find the other day there have been an oil and gas lease placed upon this property. The party who took this oil and gas lease apparently thought they could develop it, or otherwise they would not have taken it.

Q. Let's move to the next tract, 107E. Again in this tract the only mineral interest before the Commission is the lessor's interest. A. The landowner's interest, yes.

Q. The other matter having been disposed of. What is the value, the before value of the interest of Mr. Kerkoff on 107E? A. Well, the easement of 107E consists of about 83 acres, of which 80 acres is east of the section line, or in the W½ NW ¼ of Section 3, and the 38 acres of the easement, and the 80 acres out of this particular quarter section are part of a 200 acre ownership. In other words there is 120 acres of Mr. Kerkoff's ownership that not involved in this easement. I considered that Mr.
304 Kerkoff's entire 200 acres had the same value as the Merz and the Guthrie tracts, or $30.00 an acre before the taking. I considered that the south 40 acres of the easement tract, or of tract A-107E, because of the height limitation could probably be not developed. So that we are dealing here with 80 acres in this quarter section, of which 40 could not be developed. The remaining 120 acres of the ownership could be. The 40 acres that could not be as far as Mr. Kerkoff was concerned, his interests prior to the date of taking on the 40 acres was $12.50 an acre, and after the date of taking his interests was $2.50 an acre.

Q. What is this $12.50? A. We are talking about the difference before the easement was taken. He owned 200 acres, or Mr. Kerkoff owned a half interest in 200 acres.

Q. What was his value? Was it $15.00, is that what you testified? A. That is what I am trying to say.

Q. What is the residual value? A. The residual value on the Kerkoff ownership was still $15.00 an acre on 120 acres.

Q. Is it still on the 120, or still on the 160 as it was? This is a 200 acre plot. A. I stand to be corrected. It is a 200 acre plot of which there is 40 he can't develop, so it would be 160 instead of 120.

Q. Please step up to the photo map and point that out. A. The Kerkoff tract consisting of the 200 acres, the ownership, is this area I am going around. It consists of the 200 acres here. The easement was imposed upon this 80 acres here plus a small strip at the extreme northeast corner of the NE of the NE of Section 4. So we have 200 acres to start with.

We have imposed an easement on 80 acres of it, which is N ½ of the NW ¼, and in my opinion the north 40 acres could be developed. So Mr. Kerkoff has 120 acres on the west side of the road in Section 4, and 40 acres at the NW NW of Section 3 that could be. The SW of the NW of Section 3 could not be developed.

305 Q. Let's go to that 40 acre tract that could not be developed. The value of that was $15.00 an acre before? A. $15.00 an acre for Mr. Kerkoff's interest before on the 40 acres.

Q. What was it afterward per acre? Did you say $2.50? A. No. the value after is $5.00.

Q. Of his portion or of the whole? A. Of the whole.

Q. Then his portion is $2.50 an acre? A. That is right, because you have a change in value on that 40 acres.

Q. How many dollars? A. $500.00 for Mr. Kerkoff's interest. His difference would be the same as Mr. Guthrie's, because we are dealing essentially with two 80 acre easements.

Q. It was $600.00 before and $100.00 after, that is how you got your $500.00 as to this particular 40 acres? A. The whole value of Mr. Kerkoff's interest was $3,000.00 before, his mineral interest was $2500.00 after. I might, in connection with this tract, I might say that it has subse-

quent to the date of taking been leased as to the ownership in the NE ¼ of Section 6.

Q. All of that across the road? A. Yes.

Q. I believe we have covered all of the tracts on the north end of the base. Now, let's move to the south end of the base, and state with 119E. That is the Smith tract, with a 81 foot easement on the north line to a 145 foot south line clearance. Did you apply this same study and reach a before market value as to the 140 acres as effect the minerals? A. I did.

Q. Did you arrive at the same per acre value on the minerals at the south side of the base as you did the north side of the base? A. I did not.

306 Q. Why? A. In my opinion the value of the minerals at that time under the tracts on the south end probably had a little higher value than those at the north end, in the amount of $5.00 an acre or $35.00 an acre on the south end as against $30.00 on the north, for if no other reason, they are a little closer by the length of the air base of three miles, or thereabouts, to higher priced leases to the southwest of 5 or 6 miles.

Q. What was your before value on Mr. Smith, Tract 119E? A. $4,900.00.

Q. And what was your value after the imposition of this easement? A. $700.00, or a difference of $4,200.00, or $30.00 an acre on 140 acres, and because of the clearance easement imposed.

Q. Now then, on this particular tract it is my understanding there was not a lease, therefore all of the mineral interests are concerned? A. I appraised Mr. Smith's interests as being all of the subsurface estate, and it was not under oil and gas lease, and while the clearance elevation shows approximately 140 feet at the south end of the tract, those greater heights only are along a narrow strip at the south end of the tract, and again similar to the Merz narrow strip. It wouldn't be practical to develop that narrow strip, so I considered that the change in value applied to the entire ownership of 140 acres.

Q. Can you explain the residual value the same as previous? A. Still be $5.00 an acre on 140 acres, which we get $700.00 on the remaining.

Q. Let's go to the next number tract, 122E, the Rogers tract, over on the east side, as I recall it? A. That is correct. It is the small tract of about 11 and some acres. That is taken out of a 160 acre ownership.

Q. Did you give that a before value? A. Yes, sir.

307 Q. And what was that, sir? A. $35.00 an acre on 160 acres, and I have forgotten the total.

Q. $2,800.00? A. $15.00 an acre for the Rogers interest. That tract was under oil and gas lease as of the time of taking too, Phillips Petroleum Company—the rentals was paid to the Phillips Petroleum Company on the Phillips lease up to the 1st day in December 1957.

Q. Let me ask it this way, in your opinion was there any difference between the before and after value as far as the minerals were concerned as a result of this taking? A. In my opinion there was no difference in value between the before and after, between the dates before and after the taking for the reason that this is a long narrow sliver in which the easement was imposed, and it was of such width that under no circumstances known to me or as being a practical thing would ever be desireable by anybody that had a lease on it to develop that strip as such. So the strip from a development standpoint goes as part of the ownership as a whole, and the lessee could develop this strip by drilling outside this strip, and would drill outside the strip in preference to anyplace else, and that the strip would be developed. If there is any mineral value there it could be developed without any interference by the clearance taken.

Q. Referring to 123E, is the same true? A. That is correct. It is part of 160 acre ownership. The easement imposed was a triangular strip of approximately one-half mile long. The tract was identical with the Rogers tract, and it was leased by the same oil company, and that interest is not in litigation. We are only interested in the lessees or the group of lessee's interests.

Q. I believe it is a group of royalty owners' interests? A. It is a group of royalty owners under the Phillips lease, and that their interests was not impaired by the clearance easement that was placed on tract A-123E.

308 Q. As a matter of information on 122E, was the delay rentals, were they paid until the term of the

lease expired by its terms, or do you know? A. Mrs. Rogers testified the other day, and the records in Cordell substantiate her statement that the rentals were paid up to the last year of the primary term of the lease, or 10 years. In other words they released the lease in December of 1957 which was very close to it, which was the same month in which it expired. The same thing, as near as I am able to determine, applied to the Phillips lease on Tract 123E. I could be mistaken on the last year rental payment, but at least the lease was in existence at the time or as of the date of taking. They dropped both of these leases at the expiration date.

Q. Let's go to Tract 124E, the Hoover tract, with 120 acres across the road and 40 acres up under the clearance easement, having an elevation or glide plane angle of 109 feet on the north to 150 feet on the south, of which Hoover's had the entire ownership? A. That is correct, it was not leased.

Q. What was the before value of that entire ownership? A. At $35.00 an acre, the 40 acres, the entire ownership was $5,600.00.

Q. And in your opinion what was the value after the taking? A. $4,400.00 on the entire ownership.

Q. Or a difference of $1200.00? A. On the 40 acres, that is the only 40 acres of the ownership. They owned additional land across the road, that is the only part of the ownership the easement was imposed.

Q. In your opinion you concluded that there was a $30.00 diminution in value as a result of this taking, but there was still a $5.00 per acre residual value for the reason you have previously given? A. That is correct.

Mr. Whiteside: Let's recess until 1:30.

Reporter's Note: Now, the hour of 12:00 o'clock A.M. has arrived, and the hearing was recessed until 1:30 o'clock P.M.

309 At said time all parties appearing as heretofore, the following proceedings were had, to-wit:

CARROLL V. SIDWELL, recalled as a witness, having been heretofore duly sworn, testified as follows:

Further Direct Examination

By Mr. Camp:

Q. Mr. Sidwell, referring to the Davis Tract, 118E, the first Declaration of Taking. Did you, by applying the same method which you previously testified to, come to a conclusion as to the before market value as to the minerals under that tract? A. I did.

Q. And what was that figure? A. My information——

Q. I would say this, for your benefit and the Commission's benefit, the lessor's interest is all that is left in this. Magnolia has been taken care of otherwise, so this would be limited to the lessor's interest, and along that same line I have just checked with Mr. Meacham and the Magnolia Lease was still in effect at the time the second Declaration was taken, so the same is true as to all three tracts, 118E, 142 and 142E. A. At the time of taking in March of 1956, Mr. Davis had a 60 acre royalty interest under the Magnolia Lease, and on the basis of $35.00 an acre for the full interests, Mr. Davis' interest had a fair market value of $17.50 an acre, or $1,050.00. And after the taking Mr. Davis' residual interest, after depreciating it by the taking of the easement, it had a $2.50 an acre value, or $150.00. Leaving a difference by the taking or the imposition of the easement on Tract 118E of $900.00. The difference between $1,050.00 and $150.00.

Q. In other words it lowered his value $15.00 per acre? A. That is correct, and I believe because of the difference in elevation I do not think it could be developed.

Q. Then it is my understanding that you applied this to the entire 60 acre tract? A. That is correct, to the ownership.

310 Q. Not just that within the clearance easement? A. Not that within the easement of 50 acres is correct.

Q. Going to that 15 and a fraction acres, the subject of Tract 142. What was the before market value as to that tract? A. As to Mr. Davis' interest, the before fair market value was—that part of the easement tract or 15 acres, which had a residual value to Mr. Davis of $2.50 an acre on 15 acres, would be $37.50.

Q. And, of course, all of that was taken in fee? A. They took a fee simple title, the Government took everything.

Q. So that would leave a total as to that tract? A. Yes.

Q. On 142E, could you tell the Commission whether or nor that tract retained its residual value of $2.50 an acre to the lessor's interest? A. In my opinion that it did, for the reason that 142E is the residual part of Tract 118E after taking the fee part of 15 acres. Now, the residual that was left after 118E, and the value of it is the same 142E, being 43.63 acres, was taken care of in the previous easement. So the residual easement at the time of taking 142E was $2.50, and there was no change in it.

Q. So there was no damage as a result of the taking in 142, the minerals? A. In my opinion.

Q. Now then Mr. Sidwell, if I may show you a map which is Government's Exhibit E, and call your attention to sales No. 18 and 19, the two strips along the west side of the Base, and ask you if you are familiar with whether or not those tracts had any easements imposed upon them, and the heights of those easements? A. Both of those tracts do have easements imposed upon them, and the clearances on the east side of the *tracks* are 13 feet and on the west side of the tracts that on which the easement was imposed is 53 feet. The easement does not cover all of the ownership.

311 Q. Now then, in your judgment by virtue of the height of the easements, and the width of the land, is there a residual mineral interest; or put it another way, what is the mineral value of that particular tract of land on a per acre basis? A. Residual value, or the value before it was taken?

Q. We are not concerned what it was before, we are concerned with what the situation was after it was sold. A. In my opinion the residual of the minerals under those two tracts would be the same as stated for the other tracts, in the vicinity that they have easements on them was $5.00 an acre.

Q. Was there any other considerations that you took into account on making this appraisal that you considered in reaching your values? A. No, I believe I listed them all. I took into consideration all of the facts that I could obtain in this area, or elsewhere, that pertained to this area in order to arrive at these appraisal figures.

Q. Let me ask you Mr. Sidwell, is the mineral values per acre presently as high as they were at the time this lawsuit was instigated, or instituted? A. In my opinion, no.

Q. That is all.

Cross Examination

By Mr. Denver Meacham:

Q. Mr. Sidwell, when you say fair cash market value, what do you mean? A. I mean what a willing buyer would pay a willing seller, both with full knowledge of the facts at a specific time, neither being forced to buy or to sell.

Q. And in your opinion under that definition that it is your opinion that if Mr. Merz wanted to sell his minerals under the Merz tract, and he encountered a man who wanted to buy, that he would end up with a value of $30.00 an acre for those minerals. Is that correct? A. That is correct.

312 Q. Are there some sales in this township where minerals have sold for $30.00 an acre? A. As of the date of taking and prior thereto, the information I have there were no minerals that sold for as much as $30.00 per acre.

Q. Was there some that sold for less than that? A. Based upon the analysis that I said, taking all factors into consideration, the bonuses were certainly considerably less than that.

Q. Was there any minerals sold as low as $30.00 an acre during 1956 or before that time, or since that time? A. I was unable to find any mineral sales as such. If there were any I didn't find them in the records.

Q. You found no mineral sales at all? A. As such.

Q. Did you find any mineral sales in Washita County as such? A. Yes, there are mineral sales in Washita County, but I made no particular effort to comb the county for the reason stated. I felt that we have to stay—one of the requirements in appraising an estate of this nature, you have to stay close to the subject tracts, and minerals might be sold in another area that would have no bearing on this.

Q. Did you find any sale in Washita County, Oklahoma, for minerals as low as $30.00 an acre? A. Not in this township.

Q. Did you find any in Washita County? A. I didn't check it in Washita County.

Q. Did you find any sales at all? A. No, not on that.

Q. Did you find any sale as low as $30.00 an acre? A. No. Well, I will have to go back here and say there isn't a sale of minerals in this township, that I don't think it is comparable. I don't think it has any bearing on this.

313 Q. What sale or minerals are those? A. Over in Section 18, and apparently the man disposed of 5/8ths mineral interests to five people or 8 acres each.

Q. Was that the Rivers' land? A. I don't remember the name. The name escapes me now, I remember the fact it was in Section 18. It was the E ½ of the SW ¼, the Mineral Deed executed July 12, 1957, the consideration written out in the deeds of a total of $40.00 each, it is recorded in Book 272, Pages 552-3-4-5-6, and the deed recites that to each of the buyers a 1/10th interest (8 acres), which would be a 10th under the 80 acres, or a consideration of $5.00 an acre. I didn't consider it.

Q. That is the E ½ of the SW ¼ of Section 18? It has the name of Melvin on it here? A. No, sir, it is on the other one there. Apparently Freels is the landowner, he only owned a half interest in the minerals and he disposed of all he had. That is the only sale of unleased minerals that I found in this township.

Q. You didn't find any other mineral sale in Washita County where the consideration was as low as $30.00? A. Neither did I find any that was higher, because I did not check the sales in Washita County. I checked them in this township.

Q. If I understand your testimony right Mr. Sidwell, if I own a piece of real estate, and own all of the minerals, and I execute an oil and gas lease for a period of 10 years on that property, I have in effect sold half of my minerals, is that correct? A. You have contracted away your rights, you contracted away 7/8ths of the rights, which I say at that time is half of the total value.

Q. In terms of value, just as soon as I made that lease for a period, or certain period, I sold half of my minerals. Is that correct? A. No, you actually sold 7/8ths.

314 Q. I actually sold 7/8ths? A. Yes.

Q. But I decreased the value 50 percent? A. I

think the retained royalty of the landowner at that time is worth as much as the lessee's.

Q. Suppose I lease it for five years, again it is just the same thing? A. That is right, term has nothing to do with it.

Q. If it is 5, 10, or 20 years, still it is decreased half? A. That is right, at that time.

Q. Suppose I lease it for 10 years, and it has run for 9 years and 11 months, still is my value only half of my minerals? A. In this case I think so; yes, sir.

Q. In other words if there is only one more month to run on this lease, there is a lease on my land and just one month to run on it, that my minerals are decreased in value by one-half? A. The lessee can still come in there in that month and drill it and keep the lease in effect.

Q. Do you do any farming? A. Yes, sir.

Q. Out here? I don't know how it is where you live. A. We lease farms with fourth and third crop rent. I have done some of that and over where I am it is not very profitable.

Q. When I lease my farm for 10 years, and retain a third and fourth rent, do you think I have sold half of my farm? A. No.

Q. My tenant gets two-thirds and three-fourths of the crops, you don't think I have sold half of my land? A. No.

Q. Isn't that comparable? A. No. You have sold away a leasehold right which gives them a right to develop it.

We are talking about two different things. You are
315 talking about the value of the relative value in the lease, and I say the fair cash market value of the royalty at that time and the leaseholder's estate at the time it was taken or at the time it was leased, that the value in the terms of fair market value are the same.

Q. In other words you say if I own some royalty and it has an oil and gas lease on it, that when I sell that royalty I will—with me being willing to sell and a fellow being willing to buy, that the royalty is going to bring just half as much, just simply because there is an oil and gas lease? A. No, I think it will bring as much or more than the value of the lease.

Q. Apparently I don't make myself clear. Suppose I have some minerals and they are worth $100.00 an acre, assume that? A. Alright.

Q. I execute an oil and gas lease for a period of 10 years? A. Alright.

Q. And that lease is of record and I want to sell you my minerals, and you want to buy my minerals that were worth $100.00 an acre before I put the oil and gas lease on them, will you now just pay me $50.00 an acre just simply because the oil and gas lease is on there? A. You sold 7/8ths of the rights.

Q. Are they now worth just $50.00 an acre? A. The royalty, in my opinion, is worth just half as much.

Q. It is your position, and that is your testimony that the mere existence of an oil and gas lease by itself, nothing else considered, reduces the value of the minerals one-half, is that correct? A. Of the landowner's minerals, that is right.

Q. In other words the answer to my question, my hypothetical situation of $100.00 without the lease and $50.00 if there was a lease? A. That is right.

316 Q. Is that borne out in sales of land in Washita County? A. No sales in this township. Any statement of what happened in Washita County would be highly speculative on my part. I didn't check the records. I didn't think it had anything to do with it. I think in numerous instances elsewhere, other than Washita County, that generally on wildcat areas or wildcat leases there is generally more demand for it, that it generally goes higher than the lease value at that particular time, above what the oil company paid the bonus for.

Q. In other words your testimony is that the fair cash market value of minerals is automatically reduced 50 percent simply because there is an oil and gas lease on them? A. The landowner's interests is reduced because he has sold part of it.

Q. The minerals themselves, subject to the lease. When a person takes a lease on the minerals he doesn't become vested with title to the minerals, he had this right to drill, to develop, to pay expenses, and to remit 1/8th of any production he gets, or if he doesn't produce he loses his lease after 10 years time? A. That is true.

Q. Mr. Sidwell, you have been appraising for the government since 1940, is that correct? A. Not continuously, or all of that time, but I have done a lot of appraisal work for the government during that time.

Q. Do you appraise for anyone except the government? A. Not in the last two or three; I have appraised for numerous individuals and companies.

Q. At the present time your sole livlihood comes from the government? A. Yes, and other income that has nothing to do with the appraisal business.

Q. Did you prior to the Declaration of Taking, did you assist the government in making an appraisal of the mineral interests involved in this litigation? A. Prior to the Declaration, prior to March 1956, I did not.

317 Q. You had nothing to do with this appraisement of fixing the values that was set forth in the Declaration of Taking? A. I did not. My first time out here was in the summer of 1956 after the detail had been filed.

Q. Did you have anything to do with it, in fixing the values in the Second Taking, in the Amendment to the Complaint on the Davis land? A. That I can not answer. I did some work for the government in this area, and around, and in connection with other tracts on the base in July of 1956, and at the time they filed the Declaration of Taking in March of 1957, whether they took anything that I had done for them previously into consideration or not I did not know. I did not know. I did not do any more work for them up until the time the Declaration was taken.

Q. Have you ever made an appraisal for the government which they did not use in litigation? A. I can't say. They have litigated on a lot of stuff that I appraised or was involved in, where I was not involved in the litigation.

Q. Where you was not a witness? A. Yes.

Q. You spend most of your time however as a witness for the government at this time? A. Yes, sir.

Q How much are you being paid for acting as an expert witness in this particular litigation? A. $100.00 per day.

Q. For the days that you are in Court, and the days that you spent preparing your appraisal? A. Yes.

Q. Do you know about how much up to this date your bill is, how much you will be paid for your testimony in this case? A. I hadn't been worrying about it. I will eventually get paid, it will be several hundred dollars.

Q. It will be maybe $1,000.00, won't it Mr. Sidwell? A. That is wishful thinking, I haven't figured it out.

318 Q. You have been down to Cordell, and you have checked all of those records down there, you have

checked with all of the land men and the lease people; I think you mentioned 5 or 6 of them, so you spent a lot of time getting ready? A. You understand in preparation for this particular thing that there was certain rechecks, and I have been to the Court House at Cordell, but in addition to that in at least three or four different instances, I have spent a lot of time in the Court House at Cordell in the last 3 or 3½ years in checking records in connection with this, or other government projects, other government projects in this general area.

Q. Are there any other government projects in Washita County? A. Not to my knowledge.

Q. It is just this base? A. I checked records down there in 1956 in respect to this Air Base, since that time I have checked some of the records generally with respect to Fort Cobb, Foss—that are not in Washita County.

Q. Who took this lease on the Guthrie land? There has been quite a bit of talk about this. When was it taken? A. According to the records in the County Clerk's Office at Cordell it was taken on the 21st day of August, 1959, by Hubert Douglas.

Q. About two weeks ago, is that right? A. August 21st.

Q. Did he assign that lease to someone? A. He did.

Q. Who to? A. It is recorded as assignment from Hubert Douglas to the Mack Oil Company, and the assignment and the filing date on the oil and gas lease is the same. They were both filed last Friday.

Q. Are you familiar with the Mack Oil Company? A. No, I haven't placed them exactly. I just don't know who the Mack Oil Company is.

319 Q. The truth of it is you haven't heard of them before in your life? A. No.

Q. Do they have any other leases in that area? A. Not to my knowledge, they may have one more but I don't remember.

Q. They just picked out this one lease on the Guthrie land as far as you know? A. To my knowledge. I don't remember finding any other Mack Oil Company leases in this township.

Q. On the lease on Kerkoff, it covers the area across the road? A. That is correct.

Q. The one that has just this little—— A. It is on this map, the road is along the west side of it, splits the

Kerkoff 200 acres, and it is this 120 acres over the road in Section 4. In fact it is Lot I, and the S ½ NE ¼ of Section 4 is under an oil and gas lease to Kingwood Oil and Gas Company.

Mr. Whiteside: The Northeast corner of this tract we are talking about that is under an oil and gas lease, is it part of the easement on 107E? This part here is the only part effected by that oil and gas lease?

The Witness: This part here, and the Northeast of 4 is involved in the oil and gas lease. A little corner up here on the northeast out. NE NE ¼ of 4 is under this easement of 107E.

Mr. Whiteside: The lease?

The Witness: The lease goes to the road, and the easement is west of the road.

Q. And there is a lease on the Guthrie land that was made August 21, according to the records down there? A. Yes.

320 Q. Is there a lease on the Merz land? A. It wasn't at the time it was taken, and there isn't now as far as I know.

Q. How about the Davis land? A. The date of taking of the Davis land on the whole 60 acres, the Magnolia Petroleum Company had an oil and gas lease that would expire July 15, 1958.

Q. No new lease has been taken? A. No.

Q. That is true of 118E, 142 and 142E? A. The Kerkoff and Guthrie leases are the only new leases on the subject tracts.

Q. No new leases on anything else? A. No.

Q. The leases that you have in blue in this township shown here on this map are new leases? A. Leases that were taken either after the First Declaration of Taking, or after the Second, and they are leases that will expire by their own terms if the rentals are paid in 1967, 1968 and 1969.

Q. Is there a considerable number of new leases which you show in blue? A. Actually by counting them, I might have made an error in one or two. There is 35 old leases on that map and 37 new ones, either on 80 acres or larger tracts. Most of them are on 160 acres.

Q. On the NE ¼ of Section 26 on your map here, the

ownership shows Ethel Gray and Claud C. Mullen. Your notation shows the lease to Atlantic, which expires September 25, 1967. Is that information correct? A. Yes, providing the rentals are paid.

Q. Was there a bonus paid for that lease? A. I don't know, I rather suspect it was. I don't know what it is.

321 Q. I thought you said you checked to see about all of these bonuses? A. I didn't check with the Atlantic on that particular one. Well, recently I checked with a recognized lease broker what had been paid for these leases.

Q. The dry hole was in November of 1952? A. Yes.

Q. This lease was made in 1957? A. That is right.

Q. As a matter of fact there was a lease prior to that time, between that time and the '52 lease? A. I feel sure that at the time the Phillips Well was drilled that all of those tracts were under lease by somebody.

Q. In other words on this particular tract here there has been two leases put on that property since 1952, since the dry hole? A. Well, there has been at least one put on it, and might have been one in existence when the dry hole was drilled. Maybe the second lease, I didn't check.

Q. You thought probably a bonus was paid. What made you say that a while ago? A. The landowners in this area, or any other, they don't give anything away. They get something, if they can.

Q. Do you know what it runs in this area? A. Some of the more recent leases, my information is, they might have paid as much as $10.00 an acre for them, and one or two instances where there was less bonus than that paid on the old leases. There are three leases north of Guthrie that was taken by the Sunray in 1953 after the Phillips dry hole was drilled, which they paid $7.50 an acre bonus. Peppers Refining Leases on the Guthrie and Kerkoff at the time of taking, my information was that Peppers paid $5.00 an acre for those in 1948.

322 Q. The general market then, you wouldn't say for sure, but you suspect $10.00 is the usual going rate right now? A. I think so.

Q. In past years it was $5.00 or $7.50? A. Yes, and in instances in the southwest part, extreme southwest part of this township, due to the activity down there, they might have brought more money.

Q. Still though, even though the oil company would pay $10.00 bonus, and $1.00 a year delay rental on a lease, you still feel that what the landowner had left, plus what the oil company took, was just worth a total of $30.00 to $35.00? A. That is in my opinion, that is correct.

Q. Mr. Sidwell, I believe you testified you have had considerable experience with production of oil? A. And drilling, I have had a lot of experience.

Q. How high is the type of oil derrick that is necessary in order to drill these, I believe you said this was a deep area? A. I would say 123 to 134 feet.

Q. 123 to 134 feet. Is that the overall from the ground, or is there some sort of substructure? A. Sometimes they raise them up, they usually do on these big ones, a 7 or 8 foot substructure.

Q. On these deep wells there is a substructure 7 to 10 feet? A. There is a place under the floor where they can go in there and work.

Q. They raise the substructure up 6 to 10 feet? A. Yes.

Q. And the derrick itself is—the derrick itself is 126 feet high? A. If you put a substructure of 8 feet high it would be 135 feet off-hand, pretty close to it.

323 Q. From 135 to 140 feet, in those limits, around 135 feet, that is the height of the type of oil derrick that is used in this particular area? A. Well, the answer is yes, because the two deep exploratory wells that have been drilled is deep, and you don't just go in there with a drilling mast to drill a 10,000 or 12,000 foot well.

Q. Your testimony is that as long as it is that high, as long as it is 135 feet or 140 feet, as long as the landowner still has that much clearance which he can lease to the oil and gas company, that his minerals are not affected except for the residual that is left, is that your testimony? A. No, I think that the landowner has some rights under these easements. That would be a part of the spacing pattern. For example, one of these tracts that has a clearance of 145 feet, and I stated along the south end of one of the tracts there was a narrow strip, I believe we said the south part of the tract had 145 feet clearance. Well, from a practical standpoint it would be a little bit unreasonable to put a 135 foot derrick in there next to the road.

Q. It is your testimony that the government easement

on all of the Guthrie land, but 40 acres covered by the easement, and the land itself, you figured just the 40 acres of the 83.70 acres? A. Actually that is it.

Q. You feel that his market value has been decreased all but $5.00 an acre? A. That is right.

Q. On 40 acres of the Guthrie land. The other 43.70 acres doesn't hurt a bit, the minerals will sell just as well with that on there as not, is that your testimony? A. That is my opinion, further that they can be developed.

Q. As I remember you said a minute ago when I asked you—what we are talking about is the fair cash market value, is that right? A. That is right.

324 Q. And you feel that whether there is an easement or not there, it doesn't make any difference? A. On the remaining 120 acres?

Q. As to the fair cash market value of these minerals? A. That is right.

Q. And the same way on 80.10 acres of the Kerkoff? A. Correct.

Q. And on the Rogers and 123E. They have an easement on there, and in this hearing we are concerned only with the minerals on A-123E, and the government might as well not made them defendants at all? Was there any reason to make them a defendant? A. I am not an attorney. I don't work for that part of the government what they take or don't take. Actually from the landowners' standpoint there is nothing to interfere with the Rogers, McDonald or Rivers' tract.

Q. I know you are not working for the government except on contracts and that sort of stuff, but on this mineral interest there is no reason for the government to have an easement on this mineral interest because it doesn't effect the mineral interest. Would you say that is right? Is there any reason to have an easement there at all if it doesn't effect it at all? A. Practically none. I know of one Air Base where a bunch was deleted from the taking because it was determined in the office, they had small tracts, they were getting in another ownership, and the cost of acquisition of a small entity out there of a half-an-acre out of 400 acre ownership, they couldn't justify the expense of it.

Q. That is two or three times you said something about the Perrin Air Force Base or some other Base somewhere else. If I understand you right on these minerals we have to get pretty well zeroed in on this area, the bonus that they pay down here around this, the producer down here, and the bonus they pay down in here, and the bonus
325 they pay outside of this township might not be very helpful in determining the fair cash market value of this royalty? A. That is my exact intention. In order to apply bonuses and that sort of thing to the determination of the fair cash market value before, the bonuses and the factors you take into consideration, of necessity, have to be close to this property. You can't go off in the next county and get something and come in here and say this will work here and so on. You have to stay inside the ball park.

Q. That is all.

Redirect Examination

By Mr. Camp:

Q. It was my understanding that on the map up there you determined, or from some other source, that some bonuses have been paid. They have been paid as low as $1.00 per acre, is that correct? A. There is a lease south of the Base that was taken, it was taken for $1.00 an acre; it was taken immediately east of this township, one lease was taken there in which they paid $50.00 an acre bonus, and my information is that the NW ¼ of 21, which was taken on the 28th day of March 1959, and recorded in Book 303, Page 581, that is south and west of the Base, and west of the subject tracts on the south end, was taken for $1.00 an acre. It is my understanding higher bonuses have been paid for other leases.

Q. That is lease sale 10 and 14 on your map? A. I believe that is correct.

Q. Let me ask you if I understand this properly. Is the reason that the royalty owned by an individual after he has signed a lease, of less value to sell because he has just been paid something and to consider it any other way he would be getting more than what it was worth? A. Not only that Mr. Camp, but in addition to that as of the date that he sells, we assume that he owns all of the minerals,

and he sells either part of the minerals, but we are talking in this case of selling an oil and gas lease. Now,
326 the total minerals he owned are worth X dollars, whatever it might be. In this case we say the total value is $30.00 on the north end of the full mineral interest. Now, he sells away 7/8ths of that interest by contract for a period of 10 years, and at that time certainly his remaining interest can not be worth more than something. If you went to *by* his interest at that time it would only be 1/8th. I am giving him credit, and we do—I think it is standard practice instead of his interest being worth just 1/8th of the total value that his value is one-half. The value of the minerals itself at the date of sale did not change. If they were worth $100.00 an acre, the total can't be much more than that. If the man leased it nothing to change it. I can't see that the landowner's royalty would be as much as the whole was before he leased it. He sold something, and got rid of some and got the money for it.

Q. That is all.

Mr. Camp: We move the admission of Government's Exhibits 10 and 12, with the reservation on Exhibit 12 to remove it after the case is over. It is rather an extensive geological map.

Mr. Whiteside: Those exhibits will be admitted in evidence.

Reporter's Note: Government's Exhibit No. 10 is attached to the original copy of the Transcript. The same is not shown in the copies of the Transcript for the reason the same is difficult of reproduction.

Examination by Mr. Whiteside:

Q. Mr. Sidwell, in the wildcat areas such as this township involved, other than transactions between members of families which is probably what this one mineral deal was—— A. It looks like a thing like that.

327 Q. Isn't is extremely unusual for there to be transfers of mineral interests, of the minerals alone? A. The transfer of mineral interests and portions of mineral interests in more valuable areas, you find a lot of that. The more valuable the minerals, the general tendency is to sell off a portion of them, but in an area like this, and I run into this time and time again, not only in

this particular thing, but the Texas Panhandle is a good example and certain other parts of Texas, and other parts of Oklahoma, that the landowner just doesn't sell off a portion of his unleased minerals. He will hold them together, if no other reason to lease them to get the bonus. When he sells those minerals they are gone forever. He can get his lease back when it expires if it doesn't produce. That mineral sale is a perpetual one in Oklahoma.

Q. Do you know of any state of minerals, I am talking about minerals alone and not reservation of minerals, of actual conveyances of minerals alone in wildcat areas for as little as $30.00 an acre? A. There is a lot of them, not maybe in other parts of Washita County, but there is a lot of minerals that sell for—this is a little remote, but in the Texas Panhandle and certain parts of Oklahoma in the past, there have been minerals sold for considerably less than $30.00 an acre.

Q. The entire mineral interests? A. Portions of minerals. They won't sell all of the minerals, they might parcel out a piece. The parcel would be less than $30.00. I felt in this particular instance, in these Base Tracts that the $30.00 an acre to the total value of the minerals might under the circumstances might be liberal, I could be mistaken.

Q. That is all.

Examination by Mr. Tisdal:

328 Q. How did you arrive at the value minerals, or how do you? A. I take into consideration the area, the bonuses and rentals paid, and I can't find any place in this township where anything like $10.00 or $15.00 an acre were paid for leases around this date of taking.

Q. How far away from the base are you considering on valuation? I mean from this Taking? A. I would say within a radius not over 4 miles, about 3 miles maybe.

Q. How far is it from the edge of this taking to this well over in Six, also the well in 2-10-20? A. Well, the south end tracts in this case are three miles south and 3½ miles west from the Shell in Six; the north end——

Q. Straight across as the Crow flies? A. The north tracts would be approximately 7 miles and the south tracts would be about 4 miles.

Q. You value the north edge more than the south, is that right? A. No, sir; less.

Q. The north edge less than the south? A. Yes, sir.

Q. And then there have been recent leasings up there. Does that indicate there is any play up there? A. It means to me Mr. Tisdal, that the Kingwood Oil and Gas Company took most of those leases. Why they are interested and why they are taking the leases is one of those things you are unable to *getermine*. It does disclose that they are interested in paying some bonus of some kind to get those leases for a 10 year period. So it does indicate more activity or more interest than in this area, than at the time of taking.

Q. If I understood you at first, you stated that this wasn't in the Anadarko Basin? A. This is one part of the general Anadarko Basin. The Anadarko Basin, and the extremity of it is up as far northwest as Perryton,
329 and Ochiltree County in the Texas Panhandle, and extends south and east of here maybe 20 miles. It is an enormous geologic basin, and it covers a lot of area. This particular thing happens to be in the Anadarko Basin.

Q. You are in the oil business and you should know, and I am in the oil business. In other words primarily oil, but isn't it true that there is several ocmpanies advertising to buy royalty anywhere in Washita County from $25.00 to $50.00 an acre? A. Not to my knowledge. If they do I would rather suspect, and this is suspicion only, that wouldn't be in this immediate area. That it would be in some other area: There are some other parts in Washita County that at this time are considered as a pretty good place to spend your money, but this isn't one of them in my opinion. I think there are other areas in Washita County that are much more valuable than this. When they advertise to buy these things chances are pretty good they will comb them and buy in the most prospective areas.

Q. Do you know what value the minerals has to the landowner, to him having minerals on it and not having them? A. You mean the effects, not the change in value?

Q. Yes. A. Yes, I think the sale of property a lot of times it has a certain element, for instance where a man buying wouldn't buy it unless he can get some minerals and the man selling wouldn't sell all of his minerals. It is

considered by the landowner generally. The reason I say that, you can look at transfer after transfer in this County of Warranty Deeds from a seller to a buyer, and you will find numerous reservations of half of the minerals. The buyer likes to get as much as he can and the seller likes to keep as much as he can, it is considered.

Q. You don't know what portion then? A. No, sir, not generally. I have *have* to, in this area, say that the fair consideration would be the total of $30.00 an acre if they were unleased.

330 Q. You don't know of any that has ever sold for that? A. No, I sure don't, and I don't know of any sales here specifically where—well, I don't know about these sales that they have been discussing, and haven't talked to either the buyer or *sellever* to know what the landowner himself considered at the time they sold them. I doubt they considered them as much as $30.00 an acre, because in cases that would cut their land value way down.

Q. That is all.

Mr. Camp: Mr. Tisdal, I will say this to you, and perhaps for the benefit of the Commission, there is some explanation we will make. I will state now Government's Exhibit "E", that the values stated therein will be shown to be the values which the appraisers considered. Mr. Houck, in his analysis of the sales that the landowners placed on the minerals. That the values that the appraisers feel that should be placed on the minerals would be the $30.00 figure.

Mr. Tisdal: He is supposed to be an expert witness on minerals, and know minerals, and there was some things I wanted to clear up in my own mind for the sake of forming a valuation that was then on it, and I couldn't unless I knew exactly how he reached his conclusions. In other words I wanted to find out what the deal was, I might be thickheaded on it.

Mr. Camp: I understand your position. I wanted to point out that the values here in the map, and yesterday we were going over those, perhaps it was confusing because I believe I neglected to point out that is the value the appraiser will testify to, and show in his analysis of the sale was the value that the people in the transaction placed on it. However, he considers the minerals more valuable.

Mr. Meacham: Let's get along with the testimony, not what it is going to be. Let's hear it.

331 Mr. Whiteside: Mr. Camp, I believe you explained that when you gave us this map, that you would present testimony to support these figures.

W. D. DAVIS, of lawful age, called as a witness on behalf of the Government, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Camp:

Q. Would you state your name, please? A. My name is W. D. Davis.

Q. This is Government's Exhibit 16. What is that? A. Government's Exhibit 16 is a Soils Map of Washita County, Oklahoma, printed in 1935 by the Bureau of Chemistry and Soils by the Department of Agriculture. That is folded for the convenience of handling.

Q. You have outlined various portions of an area in pencil? A. I have outlined various portions in pencil. Those bearing the cross being properties under discussion in this case, and those on it are comparable sales that I will discuss.

Q. Referring to the maps, Government's Exhibit 13, 14 and 15, which have not heretofore introduced, being aerial photos of the area involved. They have certain colored masking tape on them. Did you place that on there, sir? A. I did.

Q. What does the blue tape represent? A. Areas outlined in blue are sales of properties in the general vicinity of the properties being appraised.

Q. And the orange? A. The areas bounded by the orange tape are the subject properties concerned in this matter.

332 Mr. Camp: We move the admission of Government's Exhibits 13, 14 and 15.

Mr. Meacham: No objection.

Mr. Whiteside: Those exhibits will be admitted.

Reporter's Note: A photographic copy of Government's

Exhibits 13, 14 and 15 are attached the original copy of the Transcript. The original exhibits are withdrawn.

Q. Now then, Mr. Davis, where do you live, sir? A. I live at Berry, Missouri.

Q. You live in the country or in town? A. I live on my own farm.

Q. What sized farm is that? A. Quarter Section.

Q. Do you operate it? A. I do.

Q. And how long have you lived there? A. I believe this is the 18th year since I bought the farm, and I moved to it.

Q. Where were you reared? On the farm or in the city? A. On a form in Platte County, Missouri.

Q. What is your formal education? A. I went to country school, of course; high school, and have two degrees from the University of Missouri in agriculture.

Q. What are those degrees? A. Bachelor's Degree and Master of Science in agriculture.

Q. Are you a member of any appraisal association? A. I am.

333 Q. What associations? A. I am an accredited member of all the professional appraisers associations or societies in America; the Society of Farm Managers, and all of the others.

Q. What are these associations that you are a member? A. Specifically they are professional organizations of appraisers, devoted to the training of men in the field to testing of men in the field as to their ability to meet a minimum standard of practice. And the American Institute of Real Estate Appraisers, which has a definition of M.A.I., it is necessary to pass two examinations, submit a minimum of three acceptable appraisals, have five years of acceptable appraisal experience, and of course meet their standard for morals, integrity and so forth.

In the American Farm and Rural Appraisers, and Accredited Farm Managers, you can become a member a little earlier there. You can become a member at 25, and the M.I.A. is 30. The American Society of Farm Managers and Rural Appraisers, you have to pass a written examination, prepare an operating plan on the farm that meets the approval of the examining committee, and of course, demonstrate their ability to do professional appraisal work

in the field. They must pass three, but must appraise the property designated by the Committee, and do it in a manner that is acceptable to them and also meet all the requirements.

The Society of Residential Appraisers concerns itself with residential appraisers as indicated. Here again a thorough examination is given, and very carefully examined, and the character and experience of the applicant is carefully weighed by the examining committee.

The American Society of Appraisers also makes some inquiry concerning both the ability and character of the applicant, and the same is true of the Canadian Society, which examines an applicant and requires from him samples of professional work and makes inquiry into their actual practice. Those are the professional appraisal organizations we have in this country.

334 Q. Do you know of any other appraisers that is a member of all the associations? A. I don't.

Q. Mr. Davis, I take it from those qualifications and associations of which you are a member, your occupation is that of an appraiser? A. This is my 28th year of practice in the field of evaluation.

Q. You have how many members in your appraisal organization? A. Total staff of about 60, including folks in the various phases of the work.

Q. Where is your headquarters? A. Kansas City, Missouri, and sister organizations in various parts of the country.

Q. Now then, have you bought and sold real estate in Oklahoma? A. Yes, I have.

Q. Do you have a broker's license? A. Yes, I am registered as a real estate broker in the State of Oklahoma.

Q. What has been your experience with real estate in the State of Oklahoma? A. As a young man my first work was for the Suder Farm Company, which handled a lot of investments; Waddell Investment Company and People's Investment Company, and many *eatern* savings banks that had investments in the State of Oklahoma. At that time we had branch offices throughout many cities in the state. As a young man my first work with the old firm was to go over these properties with the men handling them, check up on the way they were being handled, work out the

sales program, work out the method of leasing so that we could better serve who employed us.

That work took me through, I think all of the states; I also worked through the state for the various insurance commissioners in their checking of the portfolios of the various companies, and of course I have done considerable work in the state since then including this work. This 4 county area for the Kiowa, Commanche and Apache Government.

335 Q. You have testified for and against the United States Government? A. Yes, our practice about equally divided between the various branches of the government and property owners and others, and other matters in controversy.

Q. At various times have you owned an interest or owned any land in Oklahoma? A. Yes, for a number of years I owned an interest in a number of farms in Oklahoma. When prices improved those farms were liquidated, and I still now own some very small non-producing mineral interests.

Q. Mr. Davis, in connection with your appraisal activities, I understand you are a teacher? A. I have had an opportunity to teach a little in the appraisal field over the years.

Q. What has been the nature of that instruction, and how extensive has it been? A. There is four courses taught by the American Institute of Real Estate Appraisers. I have been certified to teach in all of them, and have taught in all of them. I have taught in California, Florida, Illinois, Iowa, Michigan, and back to New York this summer, and Syracuse to teach a course there, and a number of other cases over about the last 20 years.

Q. Are you related to the Davis here in this lawsuit? A. No, sir, I am not related to this Davis. I am one of the poor Davis's.

Q. Have you made an inspection of this area? A. I have.

Q. Would you generally tell the Commission, first taking the north portion of the base and then the south, and explain to them the general outlay of the area, and the soils and what you did in preparing to make this appraisal? A. The first step in the making of this appraisal or series was the general study of the area. The foundation ma

terial, of course comes from such sources as the Agri-
336 cultural Conservational and Stabilization Office, and the office of the County Agent, Bureau of Census and others, other agencies that prepare sources on agriculture. Those particular sources are only averages. They form a foundation for judgment. With that information usually at hand the next problem is one of the study of the area effected, in which it is necessary to go to the area and inspect the area, with the certain foundation material in hand. The two things that to me have been invaluable are the soil maps and the aerial photographs, particularly as they pertain to the north end of the area, north of the Air Base, are under the north runway extension. The combination of the aerial photographs and the soil maps tend to indicate the character of the soil. For example, as we see the end of the base which is approximately the center of Exhibit 8, and going north, the Base itself is on quite level land, and apparently was pretty level when it was selected, and that of course may have been one of the reasons for its original selection. As it is not unusual at all, and seems to be quite common in matters of that type. The original base seems to have been on some of the best land in Washita County. The darker type of soil with a lot of organic in it and productive. As they went up to the north of the base they got out of it.

Q. What was the name of the first kind of soil? A. The original base was the St. Paul loam. The dark colored soil, quite level and quite productive, and I think some of the best farms that we have been privileged to see down this way. Going north the soil got sandier, it is classified here as the Cobb fine sand loam. It shows quite clearly on the farm to the north, the Merz farm, on the west side of Exhibit No. 7, as I have placed my finger in this fashion or in this fashion on Exhibit No. 8. Going farther north the land begins to fall away and we get into the sandier soil yet, up over the Guthrie land and Kerkoff land. Some of that land begins to be a looser sand and some parts of course, the Merz land, gets to be looser, and they are called Dill fine sand loam; looser to work. They plow better and dry out better, and give out a little less crop
337 *oroduction*. North and west of it are the rougher areas. I have called them the Vernons; they are

really a Dill fine sand loam, part of them, and are usually kept in pasture. That is demonstrated by Mr. Guthrie's purchase on which the western portion of his purchase is crop and the eastern portion is rough, and is used in connection with his dairy operation. The daily is here, and the purchase being across the road and a quarter down. This is born out by the soil map, as you gentlemen are familiar with it, on the north side of these fingers indicate the roughness, and the green is where the base is and is the St. Paul, and to the west some of the properties that have been heretofore referred to, and some of it being in the little extensions left of that particular soil.

Q. That is Government's Exhibit 16? A. Yes. In studying the area further I checked also to the west of the base, as these exhibits are attempted to be placed, Exhibits 7 and 8 as compared to Exhibit 13 and 14, the match line or job line as I have shown it here on my finger on Exhibit No. 8 corresponds with the jog line as appears on Exhibit 14. You may have heard this referred to, the one with the jog in it as the Francis farm or the Spradlin purchase. This matter was tried at an earlier time. With that as a guidepost as fitting in, this extends south and west from the base. There the soil generally was the Cobb fine sandy loam, as shown on both of the aerial photographs, and the soil map itself. They were not many breaks, but there was a difference in the sandiness in some areas, or areas tending to be a little domey. And going south as shown by Exhibit No. 9 and 15, going to the south of the base, and the big square which I am pointing to on Exhibit 15, as being the match line for the big square I am pointing to on Exhibit 14, and the piece on 14 would be corresponding to this piece on Exhibit 15, simply down below the base. Here we find this in my judgment, generally speaking better soil, than down to the north. There is none of the roughness south of the base that can be observed to the north of the base. It is generally in the sandier soils, there is a little bit of St. Paul, I believe—no, that is not
338 correct, it doesn't quite reach it. The St. Paul stops up a little bit north of it. It is generally speaking is a Cobb fine sandy loam and Dill loamy fine sand. I found no irrigation north of the base. South of the base some evidence of irrigation was found, and some operators

are irrigating. By and large it would be my judgment that that land to the west and south of the base, and some portions to the east of the base are among the best in this part of the country, and to the north a little bit less desirable land.

Q. You mean by this part of the country, right in this vicinity of the base? A. In the vicinity of the base, and it would be my judgment in Washita County, that in all probability it rates among the better soils.

Q. In connection with this appraisal after viewing the maps, after viewing the soil map and the aerial maps, what next did you do in an effort to determine what the values were in this particular location? A. I went to the office of the Recorder of Deeds and found the property that had transferred within a fairly recent period, being from about 1954 up to date to which this value of estimate pertains, and have since gathered from that same record a few sales that have happened after that date to judge whether or not I was able to accurately estimate the market from the material at hand, and then went to the buyer or seller, each of them, of the sales after ascertaining first what was bought or sold, and what minerals, if any were conveyed and went to the party of the transaction and acquired as to the terms of the transaction, and the circumstances under which the sale was made; and then I went to the sale to see what the man bought and sold, and have made certain notes on them and drawn the conclusions from them. So it is my judgment to the property not my judgment as such, but it is my judgment based upon what people have actually bought and sold in some 24 transactions immediately around the property taken.

Q. Could you demonstrate to the Court what your next step was in this process of reaching this value? A.
339 In using the sales to indicate the value of the property, the procedure followed in the cases generally, about in the way that I can and will describe to you: As it pertains, shall we say the Merz property on the north end. In connection with the Merz Brothers property on the north end which is on the center and left hand side of Exhibit 7, or the center and on the right hand side of Exhibit 8, there are sales on both sides that in my judgment were quite helpful and quite persuasive. The sale on

the left is shown on your sale map as sale No. 2. The sale was one by Mr. Simmons to Mr. King, dated on the 16th day of February 1954. I have, of course, the book and page and the revenue stamps and such additional information if you would like it. It was a 240 acre sale, and in the transfer all of the minerals, it is my understanding, were transferred. The cotton base at the time of the sale was about 74.8 acres. The consideration was confirmed, there was a house at the time of the sale, the property being, as indicated, just to the north of the base and just across the road from Mr. Merz at his northwest corner. There was a junky little house at the time of the sale, there was a nice little house on there now, as well as I can understand it has been since purchased, a small barn, a couple of chicken houses and granary. I analyzed the sale as carefully as I could, and it looked to me about this sort of situation, a total consideration of $32,500.00 was paid, that is $135.00 an acre. As well as I could judge the buildings contributed a little over $10.00 an acre, which would be about $2,500.00. That would mean as well as I could judge, Mr. King paid about $125.00 an acre for the land. As well as I can understand from the purchases made in the neighborhood it is my judgment that the buyers and sellers estimate the minerals at about $30.00 an acre, following that reasoning and deducting $7,200.00 for the minerals which were transferred, leaves a price paid for the land of about $95.00 an acre.

Now, the property involved, of course, is not all the same kind of land. The same being about as shown on Exhibit 16, and being the 240 immediately to the west of the Merz, the most of it is, of course, your Cobb fine sandy loam. I judged about 210 acres of it was of that type. About 20 acres is dill, and about 10 acres is the rough broken Vernon, or the ditch running to the north as is shown both on Exhibit 16, which is the soil map, and is shown also by these draws on the aerial photograph. It seemed to me as well as I could estimate he paid about $102.00 an acre for the good land, about $50.00 an acre for the steep phase Dill which in that particular farm the hill sides in his pasture, which is up around his house, in about the manner indicated, and that on the rough broken land he paid about $71.50 an acre. So as a result of the sale, and my analysis of the sale, the total price for the

340

land, buildings and minerals and everything else was $135.41 an acre.

Q. Per acre? A. Yes, and the buildings about $10.42, the minerals at $30.00, leaves the surface only of about $95.00. On his soil tests that would indicate that he paid for the Cobb about $103.00 in round numbers per acre. I will just mark it Dill fine sandy loam, he didn't get any of it, but he had some steep phase Dill, and all it is good for is grass —we will call it rough broken land, about $17.50 an acre. As far as I could judge that is about the way he bought the property.

The one to the east of him, which is to the east and on the west side of Exhibit No. 7, and is shown as I am pointing, is Sale No. 9 on your map. And it is a sale by Mr. Spitz to Mr. Morrison, it too was a 1954 sale, but in my judgment it is persuasive. It is right adjacent to the property at hand. It is a 1954 sale, it is 160 acre property, and in this case however only half of the minerals were transferred. The total consideration was $18,500.00, which was $115.62 per acre. There was a two story frame house, barn, chicken house and garage, all on the property and I believe pictures are at hand on that property, and they might be tendered to you.

Q. Is this the picture that is marked Sale No. 9? A. As well as I can judge, that is one of the pictures of the property.

341 Mr. Meacham: Did you take those pictures, Mr. Davis?

The Witness: That particular picture was taken under my direction. I did not shoot the camera on that particular one.

Mr. Meacham: Did you say that was a two story house?

The Witness: You might call it a story-and-a-half, it has an attic.

Mr. Camp: We move the admission of that exhibit in evidence.

Mr. Meacham: No objection.

Mr. Whiteside: That exhibit will be admitted in evidence.

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Q. That property is not the same as the one we last discussed. It had about 49 acres of cotton allotment on

it, while the last quite similar to the property of the Merz'. It too has a little ditch up through it, and it is also shown on the soil map, approximately as I am pointing to the east of the Merz property which would be to your right? A. Yes. In analyzing the sale it therefore seems to me that it meant about as follows: That the total consideration paid was about $115.62 per acre, that is for everything. The buildings added about $12.00 per acre to the property, the minerals being half about $15.00 per acre, indicating for the surface the average price paid was about $87.75. Recognizing that the price paid for a little bit better for the Cobb than the poorer land, that indicated about $102.00 an acre for the Cobb, and about $90.00 for the Dill fine sandy loam which they have some that lays well enough to farm, about $55.00 an acre for their steep phase Dill, and about $20.00 an acre for their rough land. They are a little closer to the highway, and are a little better situated really than
342 is the sale last referred to, and for that reason it was my judgment that probably he paid a little bit more for that less desirable land, that would be the case, than if it was on the other side. I gave consideration to a recent sale also, not only in the valuation estimation of the Merz, but in the *valying* of two adjacent properties, and that is the purchase by Mr. Guthrie which is to the north. The reason I gave particular consideration of that sale because it is a recent sale to a man who should be familiar with the neighborhood, lived there all of his life, and familiar with the land, and is right north of the three properties being concerned, being at the upper right hand corner of Section 8 and outlined in blue. The west portion of the sale being of the sandy nature and terraces and being crop land, and the east portion being rougher and in pasture. This sale I gave the number of sale No. 23, and here are some pictures that might be useful if you would like to introduce them. Those pictures I took myself, and do in my judgment represent the appearance of the property at this time.

Mr. Meacham: What time do you mean? Today?

The Witness: On the 9th, at 10:55 in the morning.

Mr. Meacham: September 9th?

The Witness: Yes. The pictures shows three things to Mr. Guthrie's property.

Mr. Camp: They are Government's Exhibits 17, 18 and 19, and move their admission. Government's Exhibits 17, 18 and 19 shows the three things that might be helpful. One is the improvements, second the view of the cotton, the view of the land in cultivation, and the last view to the east of the rough land is the view toward the big draw to the east of the house.

Mr. Whiteside: Those exhibits will be admitted in evidence.

343 Reporter's Note: Government's Exhibits 17, 18 and 19 are attached to the original copy of the Transcript. The same are not shown in the copies of the Transcript.

Mr. Camp: We also move the admission of Government's Exhibit No. 16, which is a Soils Map.

Mr. Whiteside: That exhibit will be admitted.

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A. In analyzing this sale, we call it No. 23, we have a 160 acre tract and Guthrie got half of the minerals, and the total consideration that he paid for the land, buildings, minerals and all is $93.75 per acre as shown by the deed. I did not have an opportunity to discuss this sale with Mr. Guthrie because it had not been made at the time we appraised his farm originally. The buildings constituted in my judgment about $12.50 an acre, the house being small but appeared to be well kept, does have electricity and appears to be in use. The other buildings very modest. The minerals half, I estimated about $15.00 per acre, that leaves the surface at $67.50 an acre, apparently for the surface. For his Cobb which is his best soil, it is better than the other, I estimated his Cobb at about $85.00 an acre, for the Dill there being none, but for the steep Dill $60.00 per acre, and of course for his rough material about $20.00. Part of that Dill which is classed as steep as shown by the Soil Map A, it is in pasture. Both on the aerial photograph and on the soil map, it shows the west side laying fairly well, the big draw and then the east side being in pasture and rougher land. I used those in indicating the value of the Merz farm in about this fashion, that you may see them

altogether, I will put my conclusions of the value of the Merz farm before any acquisition alongside the three sales, and I refer to it by the easement number, being 104E. The value date on the Merz property is 1956, it is 160 acre property and we are concerned with all minerals. It was my judgment in his particular case that these sales indicated a total value per acre, including land,
344 buildings and minerals of about $142.50 an acre; it is higher than the King purchase, higher considerably than the Morrison, and the reason being partly size—240 against 160, and I think practically it is a little better farm than the Morrison. Now, the buildings in this case didn't contribute but about $20.00 an acre as well as I could judge, they were not extensive. The minerals in this case being about $30.00 an acre, that being another reason, of course, another reason why it would be more valuable than the Morrison sale, because the Morrison sale conveyed only half of the minerals as well as the Guthrie. That leaves the surface on the Merz farm at a little under $100.00 or about $92.50 an acre with the minerals off. Their fine Cobb sandy loam would be about $100.00 or about $96.00 an acre as they contributed to the value of the whole, and the Dill fine sandy loam, and steep phase, which they have a little, at about $72.00 an acre, and there being no rough land as there is on some of the other properties, of course it would be no contribution in this case.

The estimation of the Dill, the fine granulated steep phase is higher because their particular Dill, as it is described in the soil map, and by the soil mapping it is apparently this spot, this low spot in front, and a little roughness up toward the northeast corner, and in neither case is there particular soil type is as of such little value to the sale to the south or east, or Mr. Guthrie's sale. So it was my judgment it was about half again more valuable in either case, and I have so reflected it in the market value on the other land at about $100.00 an acre. It is higher than Mr. Guthrie's purchase. There the Cobb has a little more organic matter, it is pretty well in line with the Morrison. The Morrison is better located, being closer to the road, and on the Cobb—there is a little more land on the Cobb there, probably farm it, a little

better, basically I would say the three fall in about the same manner; that is the example, how the actual purchase of the people to indicate the actual value of the property to be appraised.

Mr. Whiteside: What is the cotton allotment on the Merz land?

345 A. I believe as of the date of the appraisal it was 67.7 acres, as of the date of the appraisal which was, of course, in 1956.

Q. Mr. Davis, in connection with this appraisal did you go on these particular tracts that you were appraising and study them, and study the improvements, and view the premises? A. I did. I went upon each of the premises and I picked up my feet and went across the various tracts. There is something about putting your foot on a piece of ground that will tell you more than anything I know.

Q. In reaching the estimates here which you have testified to as the different values, did you consider any one particular method of appraisal? A. Yes, I used each of the three recognized approaches, or methods of estimating market value on each of the properties both before and after each taking.

Q. What are those methods, and how did you apply them on these particular properties? A. The three methods are the cost approach, which I have briefly demonstrated here as a method of *appriving* at the value of the property, by judging what people are paying for properties sold; and the second is the earning approach, which I have by inquiry of the operators themselves, by studying the neighborhood and inquiry of the gin operators, formed as careful an opinion as I could, as to the typical production capacity of these farms under typical operation, that is in ordinary years, and have estimated the net that would remain to the land after the expense, and if capitalized that net return at the rate indicated by purchases and sales in the neighborhood to indicate a value of the property. That is known as the earning approach; and the market data approach, which is simply comparison of the whole of the property as an entire unit with the whole of other properties that have sold, for example of the Merz property, the whole of the Merz property with the whole of the sales on west and on the east, and on the north, and any other

sales to indicate the value of the property as an en-
346 tire unit. I have then selected that value which in my judgment is the most accurate and complete reflection of the market value at that time, and I have done that same thing after the taking, and subtracted the two to find the total amount of the damages with the acquisition of that portion.

Q. Is there any particular significance why you apply all three of these formulas to each your value, or reason? A. Yes, sir, there is a particular reason why an appraiser does that, he is using all of the tools, each method is performed in a little different way. Generally a cost approach reflects more or less a ceiling on market values, because people will rarely pay more for a piece of property than they can buy substitutes for, and that seems to form pretty much of a ceiling. The earnings approach being capitalization of the net income is generally the lower part of market value, because most farms are a home for tenants or farmers, and as a result those features do not come into all of their full play in the earning approach. The market data approach, he looks at this farm, he can *by* this one for this figure and that one for that figure, and then he selects what one which is most desirable from his standpoint in relation to the money that it costs, and the appraiser does about that same thing.

Q. You did consider other sales at this time, did you not? A. Yes, I have considered each of the sales that are shown upon the exhibits here, and I am prepared to describe each of them and tell what part they played. These, however, were the most persuasive, being closest and more similar to the property appraised.

Q. Have you read the Declaration of Taking and Complaint in this action, and know what estate has been taken? A. I have not seen the particular Declaration in this action, I understand it performs to the standard.

Q. Based upon this investigation, and your understanding of the estate taken, have you reached an opinion as to the before market value of the Merz land? A. I have.
347 Q. And what is that, in your opinion? A. It is my judgment that the market value of the Merz land before any portion was acquired by the United States, including land, minerals, and buildings, was $22,800.00, or about $142.50 an acre.

Q. I don't believe we have discussed what inquiry you made to ascertain the mineral value. Would you tell the Commission what you did in that regard? A. I personally inquired—my personal inquiry had to do with the abstracting of the pertinent leases in the vicinity; the second pertinent inquiry had to do with the analyzing of the 25 sales in the neighborhood, each of these sales, of course, had either minerals transferred or a portion transferred, or were under lease, or were not under lease. They varied in almost every instance. I considered each of the sales in relation to the price paid, and the mineral interests conveyed, when related to the buildings and the soil type and the location of the property sold, and found that as well as I could judge through the period studied the mineral interest appeared to be at about the rate indicated for it. In my third step we have the benefit of Mr. Sidwell's study, which was made available to me and which I had the privilege of discussing with him, so my opinion of the contribution of the minerals is based upon those three points. I did discuss the minerals also with certain of the owners, and as a fourth factor did rely on some measure upon their general opinion.

Mr. Camp: We move the admission of Government's Exhibit 20 in evidence.

Mr. Meacham: No objection.

Mr. Whiteside: The exhibit is admitted in evidence.

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Q. Now then, Mr. Davis, the Commission has a breakdown of your figures. Would you explain to them what your value after the taking was, to complete the record, and how you arrived at that figure? A. As is shown
348 on Exhibit No. 20, Government's Exhibit No. 20, it is my judgment that the total amount of the value of the Merz tract after the taking of the clearance easement, or after the acquisition of the clearance easement, is in the amount of $14,550.00. The estimation of market value after taking is composed generally of these three parts: It was my judgment that the minerals would contribute only about $5.00 an acre on the whole, or a total of $800.00, rather than the $4,800.00 before the taking. The main reason being because of the height of the glide angle plane making the probability of immediate drilling quite remote.

The improvements in my opinion was a substantial market—a substantial part of their value to contribution, before the acquisition they contributed about $3,200.00, and after the acquisition is $1,300.00, or about $11.00 an acre. In arriving at that estimate I considered these two or three things which I believe a prudent purchaser would consider, in the first place in the location in which the buildings were originally placed, being as shown on Exhibit No. 7 at the lower right hand corner, or the southeast corner of the tract. They were below the glide angle plane as far as the house only was concerned, and they would, of course, need to be moved. It was my judgment that a prudent purchaser looking at the property would anticipate he would have to move that house and other buildings in order to operate the property. In moving the property he would have a choice, of course; the glide angle plane does not cover the whole property, but covers only the center portion, laving a portion on the west and a portion on the east. However, in order to have a house now-adays a person likes to have electricity, he had electricity coming from the west. Each of the poles was above the glide angle plane, and as I *undersood* it need to be removed. The house at the southeast corner would put it nearer to the highway and Burns Flat, and town, and electricity would have to come in from the east. Our inquiry was it would be hard to do. He had electricity that came in from the west, and the buildings would have to be moved to the west. We made inquiry as to the cost of moving the buildings, the most—the best local man we could learn of was Mr.
349 Fred Southworth at Cordell, as being a reliable mover, and he informed us to move the house over to the southwest corner and put on a new concrete block foundation, put on concrete footings, put in a new chimney would cost about $500.00. He didn't recommend moving the other buildings. He thought they would not stand the move, and of course, we realized about all of the well that could be moved was the electric pump, and it could, of course, be moved to its new location; but a new well would have to be dug in order to get water. In considering these facts we therefore considered the cost of moving and the new well, and the cost of cobbling up the older buildings and moving them over to the new location would be such that a prudent purchaser would reduce them about $1,900.00

because he would have to put up with that. He should have some left, but he would have some problems getting them over there.

In the matter of the land, I looked at it from the standpoint of the effect on the use. In my experience with clearance easements, in this and other locations, I have observed that when land is in farming use, as long as the glide angle plane does not interfere with the man's farming operation, he farms it about as before. In this case however, there would be some interference in my judgment because there is only about 15 to 17 feet of clearance along the south line, depending where the location goes. A prudent man would obviously move his buildings out of that area, it would make it less convenient, he would be a little farther from each part of his farm than before. He just wouldn't like it as well for that reason. If he had some hay he probably would want to pick a different place to stack it, therefor some other operations that would be *interferring*. So I judge there would be some interference along the south 80 *interfence* with the farming operation. He can still farm it, but he wouldn't farm it quite as conveniently or quite as nicely as he did before. Taking the figure that I have shown you on the exhibit, and separating them between the south 80 and north 80, and leaving out the buildings and the minerals, the land alone—the land on the south 80 contributed about $98.00 an acre. That is good land and the tight spot of the imposition of the glide angle
350 plane, because of the limitations, it is my judgment this same land was about $25.00 less in regard to farming, simply because it would be a little less desirable. The north 80 however, where we are at lease from 44 to 50 feet at the corner line and up to 70 feet or thereabouts at the north line, way above any agricultural use, there is still the taking of a right, and whenever one goes to sell property it has been my experience that the buyer seizes upon every tool he can lay hands on to reduce the price. He would use this easement as another tool, it would be my judgment about $5.00 an acre would be what a prudent seller not forced to sell would be willing to accept, about $5.00 an acre less than he might otherwise have gotten, and that a prudent buyer being one who wanted to buy and not forced to buy, would be reasonably satisfied when he

saved about that much money. $25.00 on the south 80, and about $5.00 an acre on the north 80., because it is simply a trading point, and a very effective one, for that reason I estimated the total land value alone, without minerals or buildings at about $77.00 an acre after, and about $90.00 an acre before. That was compared to about $142.50 an acre before any of these easements were required, making a total amount of all the damages of about $8,250.00. That is all, everything.

Q. Did you conclude the minerals in the same way as Sidwell? A. Yes, about the same, and have so recognized it.

Q. Mr. Davis, have you been familiar with the terminology in this clearance easement over a number of years? A. I have.

Q. Did you happen to be in Washington at the time this terminology was being formulated? A. I was.

Q. Would you give the Commission the benefit of that experience as to the meaning of this language? A. I can as to the discussion that we had at that time, and there was no question in the mind of those who formulated
351 the right to acquire or to meet the need that was reported to them. The question being, and the purpose being to take the sole right to limit the height of vegetable growth and of permanent structures above a given area, or above a given plane, and that the sole right to be acquired was the right to either limit height to that distance, or the right of ingress or egress so that one could go in and bring the vegetable growth or buildings down to whatever height was acquired.

Mr. Meacham: We object to this witness testifying as to the law, I think that is perhaps a matter of legal argument when we get through.

Mr. Whiteside: Sustained.

Mr. Camp: We will point out any Court or Commission would be entitled to consider it, as you would congressional intent of what was meant and what was said, and what those that work at it meant, and this man happened to be one of those who was in there at the time this was drawn up, and therefore we submit it is competent.

Mr. Whiteside: If that would be the case you should qualify him what his position was at the time, and what authority he had.

Mr. Meacham: This is a different deal. If you are trying interpret what a particular statute says, or congressional intent, it is still a matter of law. I get a little bit out of sort, they can't tell what this means. We are a party to this, we have a right to what we think. What they think it means and what the Court says it means might not be the same thing. They are imposing this easement, and the easement will be imposed.

Mr. Gillespie: Mr. Davis, he was in Washington. Who did he hear discussing this?

Mr. Davis: I was in Washington, employed as a consultant by the Corp of Engineers. The matter was
352 laid before me. Mr. Hardy Jacobs, Chief Appraiser for the Corps of Engineers, and Mr. Joe Sandifer, Assistant and——

Mr. Gillespie: I think Mr. Meacham is correct. This isn't the same as determining legislative or congressional intent. This is getting down to personal opinions of people, even though——

Mr. Meacham: I don't think that is admissible, that is my opinion.

Mr. Whiteside: I concur with you. All of us are aware of the fact that what a group of laymen might decide something means, when it gets into written form, it might not be six, seven, eight or nine: I don't think they can at this time go back in and try to bring it up to this particular group that Mr. Davis was with.

Mr. Whiteside: Sustained.

Mr. Camp: Exception.

Mr. Camp: I want to point out these are the head of the group who has the job. This is not someone out in the field, this is someone who is responsible for acquiring this information—for acquiring this for the government, the head man.

Mr. Gillespie: I think this man would have a right to say what he thought it was in fixing these particular damages, and apparently he has a different idea than what you thought yesterday. He means vegetable growth here, where as yesterday you were talking about perennial growth.

Q. Mr. Davis, what do you have to say about that? A. The use of the term 'vegetable' as was used in our discussions had to do with such perennial plants as trees, which

would be expected to grow to a height and over a period of time that they might grow into such a plant, and therefore need to be trimmed or someway cut off. It had nothing to do with the annual crops whatever.

353 Q. Do you also have an understanding of the use of the word 'material' as to whether or not it would apply to a tractor, a piece of machinery, in your making of this appraisal? Have you considered the word 'material', and what did you consider it to mean or limit? A. As I have understood the meaning of the easement and have used it in the making of this appraisement, I considered the use of the word 'other materials', infringing up or extending into or beyond the glide angle plane, to mean materials similar to earth, or building terms, structures or anything that might be so piled, either temporary or permanently into that area. It does not mean portable equipment or machinery passing through, or annual crops in my judgment.

Q. Have you had experience with the application of these easements in other areas? A. I have.

Q. What has been the nature of that experience?

Mr. Meacham: We object to that for the same reason, you are getting into a legal point.

Mr. Whiteside: I think it is well taken. Sustained.

Mr. Camp. Exception.

Q. Mr. Davis, on Tract 106E, would you tell the Commission what you did in your study of that tract in making your appraisal? A. In Tract A-106E, which is Mr. Guthrie's tract, and it appears on Exhibit No. 7 at the upper left hand corner as I am pointing by my finger, I went to the property and went through each of the buildings with Mr. Guthrie, and went over the land with him by foot. I already had at hand the information considering the tracing made from aerial photographs and the soil map, and a great deal of background material in connection with the property.

Q. Would you continue and explain? A. In estimating the value of the Guthrie property before the taking, the acquiring of the clearance easement, I compared it

354 with the same sales primarily that I have discussed with the Merz property, and in comparing it with the same sales it was my judgment that they indicated

about as follows, as would be followed to the Guthrie property. In the Guthrie——

Q. Is that 106E? A. A-106E. The Guthrie property, the value pertains to 1956. It is 160 acres, we are concerned with one-half of the minerals. It is my judgment that the total market value of the property as of the date of the appraisal is $140.00 an acre, including minerals, land and buildings. The buildings in my judgment were quite extensive, and contributed about $74.00 an acre to the whole. Minerals half about $15.00, and leaving the surface at about $50.62. This is divided between his better soil, the Cobb fine sandy loam at $84.00, at about the same price he bought the Cobb on the north side of the road in his purchase in 1957. His steep Dill was about $71.00 an acre, and about $18.00 an acre for his rough broken land, which is pretty rough. When those values are added to the values on Exhibit 21, the total land value is indicated at about $50.22. The improvements included the milk barn, home and everything, making a total of about $140.00 for the whole.

Q. I have here what are a series of pictures, all having typed on them Tract 106E with a statement below "Chicken House, Brooder House, Garage, Implement Shed, Calf Shed and Barn, Cave at Well House, Corral Fencing, Barn and Cattle Shed, East Cattle Shed, the House, and Milk Parlor? A. Yes.

Mr. Camp: I believe that would be sufficient identification for the record, and we would move the admission of those exhibits at this time.

The Court: Those exhibits will be admitted in evidence.

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Q. Now then Mr. Davis, I believe you were discussing the improvements and your break-down of the tract
355 at the time I interrupted you there with those pictures. Will you continue? A. This tract of land is very nicely improved. Mr. Guthrie's home was only about 12 years old, and as shown by the pictures was a very attractive home. It was modern with bath room and septic tank, and was in good condition. The milk parlor which is also shown is only about four years old, and built to Grade A Specifications. The barn attached to it was built in 1943, and then the shed was built on it about five years prior to

that time. His tools was in good condition; another cattle shed and cave, his pump cave, and three-quarter horse power Jacuzzi turbine, one of the most modern pumps in it. Basically speaking his buildings were all good, proper and useful in a dairy operation, and I reflected that contribution in the value of the home and buildings. It is true, you take a dairy and you can so use the property, and I have so reflected my value.

Q. Soil wise, as to the lay of the land, did you consider that in arrival at your opinion on the 160 acres? A. Yes, I did, as well as I could judge Mr. Guthrie had only about 30 acres of Cobb fine sandy loam of the better soil for that area, he had about 75 acres in the Dill loamy fine sand, this is a little looser soil than the other, and in some respects a little less desirable. The way he was farming it he was doing almost as good with it as the better land. The broken pasture land, and pasture he had some Dill, he had some grass on it and grazing it, and he had about 55 acres out of the 160 in that particular kind of soil; that incidentally is quite similar to the land he bought across the road, the principal matter being that the home place having the good buildings on it and the place across the road having the modest buildings on it.

Q. What was your opinion as to the before market value of the tract? A. Including the land, buildings and minerals, that is to say the lessor's interest in the minerals, it is my judgment that the total market value of the before market value before the acquisition of the easement was approximately $22,400.00, or $140.00 an acre.

356 Q. What was your conclusions as to the value after the taking? A. It is my judgment that the total value of the whole after the taking including land, buildings and minerals was in the amount of $21,700.00, which is $135.62 an acre.

Q. $135.62? A. Yes, and represents a substantial loss in value as to minerals, and a very small loss in value as it pertains to the land.

Q. Did you reach the same conclusions as Mr. Sidwell, substantially on the $500.00 loss to mineral value and the rest attributable to the remainder of the land? A. I did. It was my judgment that the principal loss would be to the 40 at the southwestern corner, and there would be no

change in the use of the remaining land for mineral use. I did consider however, that there would be a bargaining position on the part of a prospective purchaser, but that the effect of the clearance easement would be so slight that the seller would have little patience from such bargaining position, and I estimated it in the total loss of value of $700.00.

Q. Sir, if we go to the next tract, 107E——

Examination by Mr. Tisdal:

Q. Sir, I was just wondering how you arrived at the valuation of the land and improvements, the difference in valuation of the land and improvements? A. Alright——

Q. I see you have improvements here $11,900.00. How did you arrive at that, from what source? A. Basically in this case, because of the specialized nature of the improvements, I considered first the production cost new. I first considered this particular type of improvements that a prudent dairy man would put on this type of property, no question in my mind he would—he might have a little different ideas about doing this one way or somebody else doing it another, but it would suit him. But I gave
357 consideration of the cost of putting them on there. I found that, of course, the cost of putting the improvements on would be quite substantial. I then estimated the depreciation being the loss in value of the house, tear, deterioration and functional obsolescence, and of the other buildings, and arrived at best I could the amount they would attribute to such a buyer.

Buyers seem to stop at $25.00 to $30.00 an acre for improvements in that area. In all of the sales I was able to consider, not one of them a dairy barn with a milk parlor on it, and there was only one of the sales that was—two of the sales I believe you might say, were generally was as attractive from the standpoint of improvements. In one case the contribution was $41.00, not a dairy barn; in the other case the improvements, the improvement contribution went up to $66.00 an acre. Now, this latter case being the Spradlin sale, his land was better land. His livestock handling improvements, not as new as Mr. Guthrie, just as modern, on a better road and better located. Bearing in that case a sum of $66.00 had been paid by a prudent purchaser, and in the other case being in the upper center of Exhibit No. 9, in which I believe of the $41.00 contribution.

I will check that to be sure. There is $43.00 an acre, almost $44.00 an acre building contribution there. In the absence of good dairy farmers to tell me where they would stop, it was my judgment that a buyer would go that far. I couldn't find a dairy sale to fence me in.

Q. You are referring to the Spradlin sale? A. Yes.

Q. Did they separate that and value the improvements separate when they bought it, or did they just lump it altogether, or is that your judgment? A. I don't know.

Q. You stated there around $66.00 for the improvements? A. Yes.

Q. How did you arrive at that $66.00 an acre? A. I appraised the farm prior to its sale. In the second
358 place I had the advantage of the total consideration and some knowledge of the sale, and of my basis of the selling of the farm and, the transaction it is my judgment that is the way they contributed it as a whole. The way I could test that was because it has been my experience that farmers when they spend their money buying land pay about the same price for about the same kind of land. Maybe a little bit higher or lower depending on how badly the man wants to buy or the seller wants to sell. But the same kind of land they want to pay about $150.00 an acre. If you analyze the buildings and the sale, and the land, it patterns in line the way farmers buy it. It is my feeling that is the way they analyze whatever they are doing. If I take the improvements and wind up with $40.00 for the land, when the land next to it sold for $150.00, then I know I am wrong.

Q. Do you mean to say that a man that has a home there and buying adjoining land that has improvements on it, he will pay a bonus? A. He will demonstrate how much more he will pay for the whole in relation to the price for the same price of land. If a bare land sells for $150.00 and he bought land, and he pays $200.00 for improvements, he pays $50.00 for the improvements.

Q. That is your opinion? A. Yes, the market tells me what they will do.

Q. You haven't got that verified they separated either one of those tracts, the one that Guthrie bought, or the land that Spradlin bought? A. I do not have their opinion of it in that particular case, but I have my analysis of the way they did it. The test by other sales——

Q. Whereabouts? A. Right next door. You recall I pointed out the situation here, that is east of it, the Spradlin sale is here. You recall there is a sale across the road here, also sales up to the north and west of it, and I have tried to study one sale against the other.

359 Q. That is what I want to find out. A. The reason an individual man's view is not necessarily the guide is because he may have need for depreciation or no need for depreciation, and may change his view to meet the particular situation. But when he writes a check for a farm my experience with buyers indicate they don't like to pay out of line with what other things cost him.

Q. That is the reason. I am in the real estate business, I am trying to find out something.

Further Direct Examination

By Mr. Camp:

Q. Perhaps it would be beneficial Mr. Davis, if you would take some of the other sales that you studied and explain how you analyzed them, and before you do that let me ask you this one thing, did you arrive at your opinion before you came here, or did you arrive at your opinion after you studied these sales and then utilized the information you obtained to determine your opinion? A. My estimate of market value was on the farm after studying the sales in the neighborhood, and studying the farm. That is one of the reasons you carry portable calculators in the country.

Q. You are taking this from this locality out here? A. Yes.

Q. That is what happened around there? A. That is exactly right. Just exactly what these people did is what I am interested in, they are the best judges of that land that ever lived.

Q. Would you take some of the sales that you studied and demonstrate a little more fully how you, from those sales and actual transactions, how you arrived at values? A. There are two other examples that I have at hand that can easily be prepared that will show about the same. The area south of the base in my judgment is a little different type of area than the area north of the base, partly

360 because of the soil type and partly because of the

community, and partly because of the roads and the location and general farming. For that reason I have used a different set of sales to indicate the value of the properties down that day, and here are those that seem particularly complete and what in my judgment they indicate. First is Sale No. 10, which is the Walters sale. The Walters' sale is a sale by Mr. McDonald to Mr. Walters in 1955, and is a 240 acre sale, as shown at the upper side of Exhibit No. 15, and outlined in blue. It is immediately south, to the west of the south portion of the base, being about a quarter of a mile, and goes only a quarter of a mile west of the northwest corner of Mr. Davis' tract, so that it may be located.

The soil types on the sale, I think, are reasonably clear, being shown on Exhibit 16 at the bottom part, I believe, of Section 21, and being primarily Cobb fine sandy loam and Dill loamy sand. The particular tract lays nicely as is shown by both the aerial photograph and by the soil map. It is nicely improved. As Sale No. 10, I believe we have a picture of the improvements at hand, being the house—in all fairness there has been work done on the house since purchase, but it was a nice house, nice brick house when bought.

Mr. Meacham: Did you take this photograph yourself? A. No, it was taken under my direction and requirements.

Q. Do you know when it was taken? A. In May of 1956.

Q. This is the McDaniels to Walters sale? A. Yes.

Mr. Camp: For the record, this is Index No. 10, a photograph attached. We move its admission.

Mr. Whiteside: It will be admitted in evidence.

* * * * * * * * * *

361 A. Mr. Walters paid $43,000.00 for this piece of land which is $175.00 an acre. It did have the house on it, which you see there, however there has been a good deal of work on it since purchase. There was a good barn on it, it is my recollection that he has also done some work on it, so it looks a little better than it did when he bought it. In analyzing the sale it is my judgment it indicated about as follows: The date was in 1955, the acreage was a 240 acre tract, minerals transferred were about one-half, the total consideration per acre was $175.00. The improve-

ments, as well as I could judge, considering the condition of the buildings at the time of purchase contributed about $21.00 an acre, the minerals being half about $15.00, the surface therefor $139.16. That made the Cobb fine sandy loam, which is in that area very good at about $153.00 an acre, Dill fine sandy loam, there was none; Dill loamy fine sand, which is a little tighter soil, there was some of it and it contributed about $110.00 as well as I could judge, as well as I could estimate, and this loamy fine sand there was about 80 acres on this quarter, and the remainder was Cobb fine loam. There was some of that in pasture at the time of the sale, about 40 acres, that is now in cultivation. Here in estimating the contribution of the buildings I considered the condition of the buildings at the time as described by Mr. Walters, and as well as I could judge that is about the way they fitted into the transaction. They were not modern, as I understand, but are now in modern and fine shape. He has done a good deal of work on them that makes them look better than they did at the time.

I utilized the McDonald transaction and his quarter section of land immediately across the road, it is Sale No. 11, across the road from Mr. Smith's property, being the one on the east side of the road with the duck pond on it, and McDonald being the tract with the timber toward the center and north edge of it—the north edge of the timber has been taken out, but in 1955 there was quite a bit of it.

362 Examination by Mr. Tisdal:

Q. Did you talk to, you say you talked to the landowners about these sales? A. Yes, I discussed it with Mr. Walters.

Q. Did you talk to Mr. Rivers when he sold it to McDonald, or did you talk to Francis on his sale? A. I talked to Mr. Francis as a property owner. I did not meet him at the time he sold the property, he left the country apparently.

Q. In other words you didn't get the details of the sale on neither place? A. On Mr. Walters' sale, I discussed the matter with Mr. Walters. On Mr. McDonald's purchase, I did not meet Mr. Rivers. I do not know him, and I knew Mr. Francis, but I have not met him since he made the sale.

Q. That is what I wanted to find out. A. That McDonald was another '55 transaction, and it involves a quarter of section of land, with the transaction the *equivilent* as well as, I would judge of about half of the minerals. The total consideration in the purchase as confirmed by Mr. McDonald was $21,500.00, which is $134.37 an acre. As I understand the transaction the seller contracted to move the buildings, there has been a nice home put on the property. There were two buildings left however. The seller had the right to remove them, and they were not removed, and as I have analyzed the sale the garage and chicken house that was left contributed a small amount or $3.00 to the whole; the minerals, about half, about $15.00, indicating a value of surface at about $116.25 per acre. There was no Cobb on the property, it was most all Dill fine sandy loam, at about $117.00 an acre, and some little tighter Dill loamy fine sand at about $110.00. The cotton allotment I believe I have, and I believe I have it on most of these other sales too, 41 acres base. As far as the cotton was concerned, and as I read this, the soil
363 map and as I studied the property, it was about 145 acres of Dill fine sandy loam, which was in good use, and as Mr. McDonald used it; he put some irrigation wells on it after he bought it, but I understand they were not there at the time of the purchase and was not considered; and I considered also this little well improved 80, it is Sale No. 15, it is a 1956 transaction, and is located at about the upper center of Exhibit No. 9, outlined in blue, being the—being east of the Davis tract by about a quarter of a mile. The seller was Mr. Perkey. The total consideration was $16,000.00, which is $200.00 an acre. There were half of the minerals conveyed; land, minerals and buildings therefor were at about $200.00. The buildings being rather nice, a four room house, 14 x 24, with electricity, 18 x 20 metal barn, frame barn, 16 x 18 cellar, and being neatly kept and in nice shape. It would be my judgment it contributed about $43.75 per acre to the value of it as a whole. The minerals, being half of it about $15.00, you get a land value of about $141.25 for the land. It is all Cobb fine sandy loam, as well as I can read the soil map.

Here we have a variation from *from* rather normal buildings to the area, and in my judgment it would indicate that

people will pay for a good set of buildings, and will pay for them in about a normal pattern of $25.00 to $30.00 an acre unless they are exceptionally good, in which they will reach over a little.

Q. Did you talk to Mr. Duree about this place? I wonder if you got the valuation from him, the valuation of the improvements? A. I did ask Mr. Duree as to his valuation of the improvements. The estimated contribution in my judgment of the contribution as it reflects itself in the market. In none of my estimates are those based upon the estimation of the buyer and seller. It is my judgment as to how they actually spent their money. Those in my estimation have indicated the various land transactions and the soil classifications on or about those dates.

364 Further Direct Examination

By Mr. Camp:

Q. While we are on the topic of improvements, did you make any analysis of those by cost depreciation, or any other method, also as a check against their value? A. Yes, in each case I estimated the reproduction cost new of the improvements and their depreciation, but in each case again I have tempered that estimate by the willingness of the people in the neighborhood to pay for buildings, and have adjusted the depreciation accordingly.

Q. And in all of these tracts the values are not what the individual says he applied on something? A. No.

Q. It is what you have judged in that transaction the improvements contributed to the total price? A. That is correct, as reflected by that transaction measured by others, as shown by the market.

Examination by Mr. Tisdal:

Q. Did you check with the insurance company how much insurance were on the buildings? Or how much insurance the buildings would carry, for instance Mr. Guthrie? A. Generally we did not check with the insurance company on improvements. We took off functional obsolescence. In his case we estimated his improvements contributed $11,900.00. His insurance company may be willing to carry more or less insurance on that for fire insur-

ance or other reasons. Therefor we did not go to the insurance company, but tried to estimate the contribution to value rather than the contribution to insurable value. In other words market value and insurable value are not the same.

Q. I was wondering if you arrived at it through an insurance company? A. We do use their techniques. When they take a building down they have a good way of taking it apart, but when it comes to value the farmer writes the check.

365 Q. I have handled sales in there for the last 17 or 18 years, and I want to get your opinion of it, because I am learning something.

Further Direct Examination

By Mr. Camp:

Q. Perhaps it would be *adviseable* Mr. Davis, on 106E, for you to tell this Commission, when you contributed approximately $200.00, not including mineral damage to Mr. Guthrie's farm, and Mr. Willcox came out with a figure something like $19,300.00, would you discuss that difference and give the Commission the benefit of your judgment as to why you reached the different conclusions, and whether or not one is sound, or what the situation is in that regard? A. In estimating the loss in value due to the taking of this right, I have tried to draw upon my experience with other tracts subject to the loss of a similar right, and to draw upon my own experience in selling of properties. It has been my experience that when people buy and sell properties and spend their own money for them, their own money they have earned farming, that they look carefully at every important thing and use every little thing, whether important or not, to save all of the money that they can. But unless the seller is in trouble, selling because of ill health or because the mortgage company is on his back, or for some other reason that makes him go, I have never known of a more independent group of people than the owners of farm land. And if they are not forced to sell they are in just as good a bargaining position as the buyer. Therefore, when there is something that is really wrong, really bad, the seller knows it even better than the buyer, and he knows just how much it affects him. In this case, for example, I

am sure the seller of Mr. Guthrie's farm would know that there was no way that he could farm this property, or build a television aerial for his house, or do anything else that he would normally do farming that would be in any manner *interferred* with, with this litigation, and I am inclined to *to* be he would be a pretty independent sort of chap, he would say to the buyer to the effect if you want to make a point of that you can go down the road somewhere
366 else. Where as if it was a real loss, something that would change his method of farming, where he couldn't do with a farm that he would like to do, and knowing that difficulty where the buyer also knew, if that being the case he would be amenable of giving him some discount.

Since there is no change in his farming operation, in my judgment, I believe even though a buyer would use it to the limit as a bargaining account, and the seller would be swayed a little, in my a judgment a couple of hundred dollars.

In transactions involving properties of this nature, with other types of easements, and I know of cases where exactly this same type of easement on it, where they got into this kind of fight—after the buyer got on the place and was there, didn't know the existence of it, and sometimes will tell you if you talk to him about it that it had nothing to do with it. So I am inclined to believe when actually measuring the thing in the market it has to be measured on the way people buy and trade. It is not possible to set up a theory that says a farmer is going to use 200 feet of air space where no farmer to my knowledge has effectively used that much air space, and build a theory or theoretical situation on what perhaps would be nice if he could do it.

The final answer is what he does do when he spends his money. In Mr. Merz case, it does effect the use of his land a little, on the south 80. In this case it is *inconceiveable* in my mind that there is anything that a prudent farmer would do there that would in any manner interfere, in a small way or a big way, and I think he would look at it that way. I considered it that way.

Q. You were in the court room and *hear* Mr. Willcox's testimony? A. I did.

Q. You heard him explain the matters which he took into consideration in attempting to reach a conclusion as to the value, did you not? A. I heard that, yes.

Q. How do you as an appraiser analyze the theory which Mr. Willcox had, and what do you say, if anything, that is in error with that theory? A. It had been my
367 experience that any valuation procedure that is not found in the workings of the mind of buyers and sellers is unsound. This theory he presented, in my experience, does not in any way enter into the thinking of buyers and sellers of property, and does not find its way in the market. It therefore is in my judgment unsound because it does not measure their actions. It is unsound in the second regard because it predisposes that a farmer would lose 200 feet of air space above his farm. This thing, in my experience, coming from 28 years of managing farms, would be quite difficult to do, if not impossible to do in agriculture.

The second thing in error, is that the same loss of value attributable to 199 cubic foot, or as to the first cubic foot against the ground. Even if such theory were sound that would make it unsound, because a prudent buyer considers that much more valuable that is right against him than something up at a great distance that he can't see. For those three reasons in the least, and many more, it is my judgment there is neither basis of sound theory or fact for the consideration of such a procedure in estimating loss in value of a matter of this type.

Q. I observe that Mr. Willcox placed a value of $60,200.00 on the total land with its improvements and minerals, and you placed a value for the same estate at $22,400.00. Almost $40,000.00 difference. What factors there are considered, and how do you account for this variation? A. Of course, I could only answer for myself. I went to the farm, walked over it, had the benefit of Mr. Guthrie's counsel in connection with it, I went to the purchases and sales in the neighborhood and saw them, I saw Mr. Guthrie's own purchase across the road, I have farmed all of my life, paid for a dairy farm and milking cows myself, and I think I have tried to estimate the value in the line the way farmers would do it. People who actually buy and sell farms. On what basis Mr. Willcox based his estimate I know not, but I find no foundation for them in this neighborhood.

368 Examination

By Mr. Gillespie:

Q. Going back just a moment to the Merz tract. I want to ask you the same question that I asked Mr. Willcox. Do you think that the imposition of this easement would affect the ability of the owner of that farm to secure a farm loan? A. As indicated by the fact Mr. Guthrie was able to obtain a farm loan on the north end of the property——

Q. I am asking about the Merz property. A. One of the best guides Mr. Guthrie did get a loan on the property adjoining it on the north.

Q. Do you think the 13 feet, the figure on the Merz, would be the same basis that you would use on the Guthrie, which has a low basis of 71 feet? A. No, I think a lender in each case; a lender would look at the case on its own merits. I have in my opinion on the south end of the Merz tract, a lender would refuse the amount of his loan because of the effect of this clearance easement upon the usefulness of his property, and I have of course reflected that reduction, reducing that value about $25.00 an acre.

Examination

By Mr. Tisdal:

Q. Do you think just by itself, Mr. Guthrie, he had another quarter that wasn't effected in the easement. But a quarter section like Mr. Merz here, by itself, do you think that a loan company would make a loan on it, in your opinion? A. From the experience that I have had in most markets, to a borrower acceptable to them—I must admit in this market they are terribly mean to an acceptable borrower. Take Mr. Guthrie's place, he bought another piece of land, he paid $15,000 for it, and he put it in with the land he already owned, and he got $16,000.00 for the two. They gave him a loan on his home place about like a good company wants to loan on land.

369 Continuing down here to Mr. Merz, I think he would be hurt bad. If they would loan him $75.00 an acre normally, I believe they would say you will have to get along with $50.00 down here, as a prudent man should. Part of the rights are gone, and you are supposed to compensate a part in this action.

Further Direct Examination

By Mr. Camp:

Q. You don't know that $16,000 was the most Mr. Guthrie could borrow on these two tracts of land? A. I do not know that to be a fact, no.

Q. You do not have any reason to believe it does? A. My only reason for thinking that, the way they would want to lend is experience with lenders, and about the way they like their loans to be on that type of a desirable operation.

It is possible an operator or person as Mr. Guthrie is, he could have borrowed more. In my opinion that is about the way they want to loan it in my experience.

Q. Now sir, moving from 107E. You have turned your sheet back. Would you explain to the Commission your analysis of this property, and how you reached your values as to it? A. In connection with Mr. Kerkoff's property, I estimated the market value of the property basically by the same three sales which I previously referred, and for convenience I will put the summary of the value estimates on the right hand side of the sheet, heading it A-107E, and entitling it Mr. Kerkoff.

The valuation here again pertains to the year 1956, and the total area of the property before any acquisition is 200 acres. It is my understanding that half of the minerals are involved, and the total estimated value of the property, including minerals is approximately $115.00 an acre. The buildings in my judgment contributed about $35.32. The minerals about $15.00, leaving the surface at about $65.00
an acre, land alone without buildings, no minerals.
370 This would indicate a value for his Cobb, which is his best soil, of about the same as Mr. Guthrie's, or about $84.00 per acre. They are about the same type of location, and about the same kind of dirt, the average. I didn't find no Dill fine sandy loam, but estimated Dill at $74.00 an acre, and his rough land on the west side of the road of it at about $18.00.

This tract as shown by both the aerial photograph, the property being located on Exhibit No. 8, and also by Exhibit No. 16, which is the soil map, has some nice laying land on the east 80, on the southwest 40, and on the northwest 40, into the middle of the property is the rough draw which I

have called the rough broken land, and some grass land on both sides of it.

Mr. Camp: We would offer as Government's Exhibit No. 22, several papers with some photos attached, being all Tract A-107E. Identified below the picture in each case as a barn, chicken house, north chicken house, the garage, the utility house, and brooder house. We move the admission of that exhibit.

Mr. Meacham: No objection.

Mr. Whiteside: They will be admitted.

Reporter's Note: The photographs above referred to are shown in the original copy of the Transcript only.

Mr. Camp: I do not know if I offered the Summary Sheet, Government's Exhibit No. 21. At this time we move its admission in evidence.

Mr. Whiteside: That exhibit will be admitted.

* * * * * * * * * * *

Q. Have you testified as to the break-down on this tract as yet? A. I have not.

Q. Before you do that, I will ask you if you concluded in your opinion what the before market value was
371 based upon, was it based upon the same method as previously stated in the other tract? A. Yes.

Q. What was that figure? A. It would be my judgment that the total market value before the acquisition of the easement $115.00 an acre, or $23,000.00 for the land, minerals and improvements.

Q. What was it after the taking? A. After the acquisition of the easement it is my judgment that the market value is $22,300.00, or about $111.50 an acre.

Q. Would you analyze that and tell the Commission how you reached that conclusion? A. In estimating the market value of the property after the taking I have considered the minerals at approximately the same as Mr. Sidwell has, and the remaining having the same contribution of the value of the half as they had before the taking; here again I have considered the bargaining effect of a clearance easement upon the seller of the property and the purchaser. The easement is so high that any probability of any interference with farming operations is quite remote, being 68 feet to 163 feet. However, it is a tool in the hands of a purchaser, and he would make the most of it, and it is my

judgment that he could save about $200.00 because of that tool on the land alone; and of course about another $500.00 because that 40 in the easement could not be drilled, making a total loss in the value of $700.00. Partly on part of the bargaining power in the hands of the buyer, and part of it by reason of the difficulty in utilizing the minerals on the 40.

Mr. Camp: We move the admission of Government's Exhibit No. 23 in evidence.

The Court: That exhibit will be admitted.

Reporter's Note: Government's Exhibit No. 23 is attached to the original copy of the Transcript only.

372 Q. Now then, perhaps it would be orderly to take up Tract 119E.

Mr. Whiteside: I think we will recess for the evening, but I would like to ask one question, it has to do with all of these tracts. Is it your opinion that the lessor's interest in the minerals where there is an outstanding oil and gas lease at the time of the taking, the lessor's interest is the same and equal in value to the leasehold interest? A. I have so considered it so; yes, sir.

Examination

By Mr. Gillespie:

Q. Mr. Davis, you have been in this appraisal business for how long? A. This is my 28th year, sir.

Q. Has that always been your opinion? A. As a royalty holder, from the appraisal viewpoint I would say yes; from a personal viewpoint there might be some conversation.

Examination

By Mr. Tisdal:

Q. All of the sales you have referred to have had improvements, and you state that you have established an evaluation from that, but there is other sales there unimproved. Have you considered those along with this same land? A. I have analyzed it in the same manner. I would be glad to demonstrate each of those to you.

Q. In Sale No. 14, unimproved, sold in 1956 for $35,000.00. That was unimproved. I was wondering if you had taken that into consideration of what the improvements does to

the sales in that vicinity? A. I have considered it in this case. Sale No. 14, that is one of the two tracts with some of that good St. Paul on it. In that case I figured he paid about $200.00 for the St. Paul, and $140.00 for the Dill fine sandy loam.

Q. Is St. Paul better soil? A. In many years, and I believe by and large it is a little better soil.

373 Q. In this area? A. Yes, in a wet year it is not as good. I think the boys like it a little better as well as I can judge.

Q. Is it in a drought year? A. As I understand the soil in a drought year the St. Paul holds the moisture better.

Q. You mean the St. Paul holds the moisture better than the Cobb? A. Yes.

Q. Do you have anything to substantiate that the St. Paul won't burn quicker in drouth than the Cobb? A. I have the matter of the discussion with some of the fellows that worked with it, and I think the soil survey seems to indicate it to. Mr. Francis seemed to be quite certain on that.

Reporter's Note: Now, the hour of 5:00 o'clock P.M. has arrived, and the hearing is recessed until 9:00 o'clock A.M., September 11, 1959.

At said time the parties appearing as heretofore, the following proceedings were had, to-wit:

W. D. DAVIS, recalled as a witness, having been heretofore duly sworn, testified as follows:

Further Direct Examination

By Mr. Camp:

Q. You are the same Mr. Davis who was testifying when we last recessed? A. Yes.

Q. Mr. Davis, I believe at that time you were in the process of discussing the sales that you examined in the community, and analyzing those sales and showing how you applied them to the subject property, and you had analyzed certain sales that had improvements on them. Now, did you not also find certain sales that did not have improvements on them, and did you analyze them,

374 and if you did what did you do in that regard? A. I found a total of five sales that were unimproved at the time of sale. They were the following: Sale No. 14,

which is the McAllister Sale, and that lays just below the base on Exhibit No. 14. It shows just below the air base towards the east or right hand side of the exhibit. Sale No. 18, which is to the southeast corner, the lower right hand side, right hand corner, partly shown on Exhibit 14, and all of it on the right hand corner of 15. The small tract being at the southwest corner of the Air Base. Sale No. 19, being the north—being north of the last mintioned sale and shown on Exhibit 14, at the southeast corner of Sale 14, and shown partly on the right hand corner of Exhibit 15. Sale No. 21, which is a purchase by Mr. Davis, and I believe partially shows at the lower right hand corner of Exhibit No. 7, as I am holding on my finger. And Sale No. 22, which is a similar sale, which is located at the lower left hand corner of Exhibit No. 8, as I am indicating by my hand. I have analyzed these sales and for your convenience have placed them on the board as follows: The first sale which I referred to as the McAllister Sale, the one in the right hand corner of the Air Base, in 1956, unimproved sale, 160 acres, all the minerals conveyed, the per acre cost $218.75; taking off the minerals leaves the surface price of $188.75. This sale had some of the St. Paul on it, as well as I could judge the purchaser paid about $200.00 an acre for that particular soil, and about $140.00 for the Cobb. There isn't much difference in the two soils there. The Cobb sells a little bit light in that particular location.

Now, the Johnson and the Walters Sales are the two sales that had been previously testified to, and are subject to a little after a clearance easement. They are both 1957 sales, one being 13.78 acres and the other 27.59 acres, and apparently all minerals went with them. The total price was $108.75. They were all Cobb, and as well as I could judge the price paid for the land under the easement was about $125.00 an acre.

Then we come to another unimproved sale, purchased by Mr. Davis himself. And as well as I could judge
375 he bought that 80 in 1958, with half of the minerals, it cost $122.18 an acre—I see I put in the wrong figure, it is $137.18 at the total price, and taking off the minerals that leaves $122.18. He paid about $127.50 for the Dill fine sand and about $84.90 for the Dill loamy sand.

The Schneberger which is shown on Exhibit 8, which is to the west of the base is a 1958 sale, 80 acres, half of the minerals went with it, to the total price of about $110.00 an acre with the minerals—I beg your pardon, I read the line wrong again, the total price of $125.00, and deducting the minerals leaves about $110.00 per acre for the ground alone. That had some rather nice Cobb on it as shown by the aerial photograph, and laid pretty nice along the south end, north end rugged, about $123.00 for the better soil and about $50.00 for the poorer soil.

As well as I can judge those are what the sales indicated, and as well as I could find all of the unimproved sales in the immediate area.

Q. Mr. Davis, in your analysis of these sales did you find any of the farms out there already had a loan on their property and bought another place with a loan on it, or another house on it, and did you take that into consideration if they already had a loan? Did that affect the market price, if it did? A. Yes.

Q. Explain that? A. With a number of those cases that I found in the market, perhaps the most recent one of course is Sale No. 24—Sale No. 22 which is the Schneberger purchase which is just across the road from the Davis tract, showing on Exhibit No. 15 in the blue, and where I am pointing.

Q. Is that the Northeast Quarter of Section 28? A. That is the Northwest Quarter of 28-10-19. In this particular tract the purchaser acquired some improvements for which I judged he had to pay about $1,700.00. He is not now using them. They are not now occupied, and in viewing the sale I am of the opinion that he probably did not particularly desire the improvements. He was forced to
376 compete with others who would have use for them; and was therefore forced to pay in line with what others would pay for them, because had no need for them. He either lets them fall down, or eventually tears the *m* out, then he of course *absorks* that additional cost in his land that he may or may not be able to get out of them when he gets ready to sell it. The next purchaser might not want a house, or might want one—in other words he has to compete with those who did want buildings or improvements. I am of the opinion that the purchaser had no particular use for the buildings.

Q. Now then, Mr. Davis, I believe that we were ready to discuss Tract No. 119E. I have marked as Government's Exhibit 24 certain Summary Sheets here which we will prove and move for their admission. Referring to Tract 119E, would you or have you prepared something already on the easel of certain sales which you considered, and have not as yet applied them to show why *ou* considered those most comparable of the sales that you would be using in determining the values of this property. A. I did prepare and place upon the easel some of the sales given principal consideration in estimating the value of Mr. Smith's tract, yes.

Q. Would you discuss those briefly, and as they apply on Mr. Smith's tract? A. The sales to which I refer have been discussed to some extent, perhaps the best way will be to put in Mr. Smith's conclusions. Tract No. 119E, this is a 1956 value estimate, and Mr. Smith, of course, had the total of 140 acres, and in this case as I understand it he had all of the minerals, and the total value in my judgment as of the date in which the estimate was applied or applies $202.85 an acre. It is a simple division of acreage and total price. The buildings were old , were nicely maintained and modern, or reasonably so, and in my judgment contributed about $39.00 an acre to the property. The minerals at about $35.00, would leave the surface value of approximately $128.71. Mr. Smith's soil was in the Dill class, largely Dill fine sandy loam, and Dill fine sand,
377 and I valued that at $100.00, and the Dill fine sandy loam at $135.00 an acre. The $100.00 an acre land is in the area where he has a duck pond.

Q. Sir, using the method which you have previously testified to as to how you applied these sales to arrive at your figures, did you reach a conclusion or opinion as to the market value of Tract 119E, the whole Smith ownership I should say, at the time before the taking? A. I did.

Q. What was that figure, sir? A. In my opinion or judgment that the total market value of Mr. Smith's entire property before the acquisition of the clearance easement was $28,400.00, including land, buildings and minerals.

Q. That is the same tract of land that, I believe you heard Mr. Smith say he valued at $30,000.00, and Mr. Willcox testified that he valued it at $45,500.00, is it not? A. It

is the same tract of land that Mr. Smith valued at $30,000.00. I can't think for Mr. Willcox.

Q. Sir, after this easement was imposed upon this land what was in your opinion the value of the land? A. It is my judgment that the value of the land alone without regard to the minerals or buildings was reduced to approximately $17,620.00, which is about $125.00 an acre for the land only.

Q. Did you reduce it to that amount? A. It was reduced to that amount. This is a loss in value in the land alone about $400.00.

Q. What was the total value after the easement was imposed in your judgment? A. The total value of the entire property, including land, minerals and all, was $23,800.00 after the imposition of the easement.

Q. Would you tell the Court how you reached that figure? A. Since the entire tract was for practical
378 purposes, since the entire tract was covered by the easement, I considered that a purchaser would have a considerable amount of bargaining power when he went to trade for it, however since the easement enters the north end at a height of about 81 feet and leaves at the south end at about 155 or 160 feet, and since it is about 120 feet above the top elevation of the house as well as I can judge, it is my judgment that the seller would not pay much attention to these complaints. He would feel pretty strong in his limitations and would not let him save very much money. He would let him save a little in my judgment, a little, about $400.00 as it applies to the land alone. Just enough to sort of cost of fooling with the additional right that is gone.

In the matter of minerals however, I have considered from a practical standpoint the value remaining was a residual value, and have estimated their contribution at $5.00 per acre for that reason. It is possible that they might be drilled toward the south end. From a practical view point I have considered only the residual value remaining, leaving therefore only $700.00 value contributed by the minerals, compared with $4,900.00 before, making a total estimate of damages in the amount of $4,600.00 including minerals and land value loss. This will not in any way affect the farm operations, but it is a bargaining tool and I feel will be used.

Q. I will show you what is printed three pictures attached to one sheet of paper, Tract No. 119E, E. E. Smith. What

are those? A. The pictures on the sheet titled Tract A-119E, E. E. Smith, are pictures of Mr. Smith's improvements at the time of the appraisal.

Mr. Camp: We move their admission.

Mr. Whiteside: They will be admitted.

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Q. Mr. Davis, there are certain shelter belts on this farm, are there not? A. There is a total of three shelter belts on the farm.

379 Q. Did you make any calculations to determine the height of the trees there, and determine whether or not they are in or close to the glide angle plane? A. I did.

Q. What was your conclusions on that? A. I measured the height of the trees in the northwest shelter belt and found them to be substantially below the height of the clearance easement where it enters the property.

Q. Therefor in your judgment the $400.00 took all of those factors into your consideration of the elements of damage? In your judgment are the trees affected? A. In my judgment they are not affected because there is about 22 or 23 feet between the height of the highest tree that I could find and the glide angle plane at the north line.

Q. And is that difference considerably more at the other shelter belts? A. It is substantially greater at the other shelter belts.

Q. Mr. Davis, if we would move to 122E. Did you use the same method as previously described, and consider the same sales to reach a conclusion of the opinion of the before market value on this tract? A. I did.

Q. And would you briefly tell the Commission how you did that, and what those factors were? A. The best way perhaps is to show how they applied to the Rogers tract in comparison with the sales given principal consideration.

Mr. Camp: Before you do that, we move the summary sheet of Mr. Davis, Government's Exhibit 25, and the last exhibit, Government's Exhibit 24, we move their admission.

Mr. Whiteside: Exhibits 24 and 25 will both be admitted into evidence.

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Q. You may continue, sir. A. On the easel here is Tract 122E, and the name Rogers date 1956, 160 acres, minerals half. In my judgment the total market value of the property is about $185.00 an acre.

Q. Is it your understanding, and the values you are reaching here are only to the surface and the lessor's mineral interest that is before the Commission here at that time? A. That is correct, only the surface and the lessor's interest in the minerals. The buildings in my judgment contributed $24.87 an acre. The minerals about $17.50, leaving the surface contribution at about $142.62. There is no Cobb loam on the property. The land to the east of the draw, adjacent is Dill fine sandy loam in my judgment, and that to the west of the ditch is about the same kind of dirt but it is looser, and I have estimated a difference in value of about $25.00 an acre, and ranging therefor from $125.00 on the west side of the ditch to $150.00 on the east side of the ditch for the same soil type, because of its difference in characteristics. While the soil map calls it Dill fine sandy loam, it is really a little bit lighter yet when you get to the ditch, and almost like the Vernon, and that is the difference in the soil valuation.

Q. Where is that tract on the aerial photo? A. The tract is shown on Exhibit No. 9 at about the left of center, at the point where I am now pointing. The improvements are approximately in the southwest corner, and the ditch to which I refer as dividing the soil types runs about as I am showing you here toward the southwest portion of the property. So that way it is a little sandier than the soil to the east and north, which seems to have quite a good body and does a good job.

Q. Based upon these various considerations that you have testified to, did you reach an opinion as to the before market value of this piece of land? A. I did.

Q. What was that? A. The market value of the entire tract of land, including land, improvements and minerals before the acquisition of the clearance easement, was about $185.00 an acre or $29,600.00.

381 Q. Not counting the outstanding lessee interest? A. Yes, only the lessor's mineral interest.

Q. Now then, sir, did you after making this study reach an opinion as to the after value, after this easement had

been imposed, and if so what was it? A. It is my judgment that the market value of it after the imposition of the clearance easement is in the amount of $29,300.00, or about $183.00 an acre.

Q. What considerations led you to make that $300.00 difference, in your opinion? A. In my judgment there was a small difference in market value suffered by the land, because of the imposition of the easement, even though it covered only a small part and only came to the buildings. This again is a tool in the hands of a prospective buyer, something he would use to get down the price, and I considered that he would use it to its fullest extent, and since it was at lease near to the improvements, and came at its widest point along the south road, he might be able to save as much as around $300.00, and I have estimated that as the amount of the damages that was suffered by the owner by the imposition of the easement.

It is my judgment there would be no loss in value of the minerals, because they can be developed in my opinion as well after the imposition of the easement as they could before. From the standpoint of bargaining power the purchaser does have a tool, and in my opinion he will use it as fully as he can.

Q. In your opinion does this interfere with it for normal agricultural use of the land? A. I find no indication that it will interfere in any way with normal agricultural use.

Q. Sir, I ask that your attention be directed to 124E.

Examination

By Mr. Tisdal:

382 Q. May I ask one question? Did you make a test of this, or are you going by the soil map of the type of soil that is on there? A. I started with the soil map, and then I put my big feet on it and walked over.

Q. Did you run a test on the soil? A. I did what tests are normally run. I ran a profile, felt of it, and did the usual field tests. I did not have a soil analyzer.

Q. I have reference to the whole area? A. Yes.

Q. Did you ever check any of the soil before it had a deep plowing and after it had a deep plowing, does that change the type of soil? These soil maps, when did they come out? A. The map that is available was printed I believe in 1935,

and with the usual delay the field work was probably done in the 20's, that would be my guess on it.

Q. Have you found any of the farms, or any soil in that territory whereby it would be a different form from what the soil map has shown? A. That is true, and I have so reported. Particularly as it pertains to this case here on the west side of the ditch, that while the soil map classifies it one way when you walk over it you will find it a little looser and a little sandier, which may lead back to the effect of the '30's on some of this soil. I am sure that is true of some of this St. Paul. In its native state it was firmer than it is now. A lot of loose sand has moved in on it. It is hard to tell where one ended and one started, and that is partly due to the farming, and partly to the wind of the thirties. It isn't all the same, it has changed by farming methods and has changed by the action of the elements in that period, and I have shown them with variations within type, rather than set up a new type.

Q. You haven't run any tests of the soil while you was out there on any of this? In other words to see whether there had been a change from what the soil map
383 shows? A. Yes, I ran every test that the soils man runs when he classifies soil. I did not run a laboratory test. The soil man when he examines soil tests profile, structure, and the size particles by feel and by taste, and classifies soil in that way. Then he takes a sample into a lab and runs a lab test. The lab test is chemical. I did not run a lab test.

Q. Did you ever know of a place in your experience whereby, say they had a Dill fine sandy loam, or Dill, and have deep plowed it and changed the soil texture altogether? A. I have not met it on the Dill. I have met it on some other soils, particularly where we had the heavy deposits during the floods where they went down and brought up tight materials. Then you are dealing with wabashes, and in some cases they did a lot better job.

In the Dill I have not in my experience met any properties in which effective deep plowing has been done, that doesn't mean 14 inches.

Q. Did you check them out in there where they have done deep plowing to see what reactions there were, or

what changes have been made in it? A. No, I didn't know where any had been done.

Q. Did you ask about any? A. No, I don't believe I made inquiry on it.

Q. You don't know whether any of them have done deep plowing or not? A. No, I think it would show more different if it had been really done.

Further Direct Examination

By Mr. Camp:

Q. What do you consider deep plowing? A. From 24 inches down. It is usually done with special equipment. It doesn't mean a mold board plow down to the beam, in my experience.

Q. I will show you what is three pictures on one sheet entitled 122E. A. I am acquainted with these pictures and they are the buildings on the Rogers tract.

384 Mr. Camp: We move for their admission.

Mr. Whiteside: They will be admitted.

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Q. Mr. Davis, we will direct your attention to 124E, and ask you again if you made an appraisal and taken into consideration all of the elements which you have related to the Court, and reached an opinion as to the before market value of the taking on that tract? A. I have utilized the same sales to which I have previously testified in arriving at the entire value of the Hoover tract of 160 acres, before the acquisition of the easement.

Q. You are acquainted with Government's Exhibit 26, the Summary Sheet on the Hoover tract? A. Yes.

Mr. Camp: We move the admission of Government's *Exhbiit* No. 26.

The Court: It will be admitted.

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Q. Mr. Davis, would you please tell what you considered in reaching your opinion on 124E? A. In case of Tract 124E, the Hoover tract. I considered the same sales to which I have previously referred. In placing the value we are concerned in the Hoover tract of the 1956 value estimate. It was 160 acres in the total tract as far as the surface is concerned, all minerals are considered. The total

value is estimated to be land, buildings and minerals $195.00 per acre. The buildings contributed about $13.75 an acre to the value of the whole. The minerals estimated at about $35.00, leaving a surface value estimate of $146.25 approximately? Here again we have a wide variation in soil in the Dill fine loam, here again I have estimated a range from $125.00 to $150.00 an acre. I don't believe there is any loamy fine sand on the property. The map did not so show. The cheaper land on it is pretty much to the south end. On Exhibit 9, the Hoover tract is shown to the left of center on the left hand side. The pasture on the south end of the tract is pretty loose sort of soil,
385 and generally the land that I valued at $125.00 an acre. The land to the north lays nicely, is farmed pretty well in line with the normal usage for that same type, and I have estimated its contribution at $150.00 an acre. There is about 25 acres of the soil back in pasture that seems to be a little looser.

Q. Using these considerations did you reach a before market value of the tract 124E as a total unit? A. I did.

Q. What was that figure? A. My judgment that the market value of the entire tract before the acquisition of the easement was about $32,200.00, which was approximately $200.00 an acre, including all minerals.

Q. After studying the imposition of this easement did you reach an after value of this entire property, and if so what was that figure? A. It is my judgment that the market value of the property after the acquisition of the easement is in the amount of $29,600.00, which is about $185.00 an acre.

Q. Would you explain to the Commission what considerations you took into account in reaching the difference? A. The only portion of the property affected by the clearance easement is the north 40. It is unimproved, and is shown as I am now pointing on Exhibit No. 9, being across the road from the buildings, and setting over more or less by itself. It is my judgment that it probably would not be considered as being acceptable to mineral development, and I have estimated a value of the minerals at about $5.00 an acre, indicating a loss in value of the minerals as a result of the acquisition of the easemen. I have estimated no effect on the minerals of the remaining 120 acres. I have

considered that on this 40 acres there would be again a bargaining tool in the hand of a purchaser, and that because this area is under the easement and is part of the whole property, I have estimated that about $400.00 would be about all the prospective purchaser could save, or a
386 prospective seller *would* be willing to reduce his price, because of the loss of this price as it pertains to the 40 acres. I have estimated the loss in the minerals at $1,200.00, making a total loss in value for the entire tract of about $1,600.00 as a result of the imposition of the easement.

Q. Did you consider the height of the glide angle plane above the property, and whether or not it would interfere with normal agricultural pursuit? A. I considered the glide angle, it entered the 109 feet—it entered the north end of the property from 109 feet and left from the south end at 156 to 161 feet, that would not in any way interfere with any agricultural operation. It would simply be a bargaining tool in the buyers' hand.

Examination

By Mr. Whiteside:

Q. Mr. Davis, isn't this the glide angle plane above the Hoover tract about the same or more in altitude than the north 40 acres of the Guthrie tract, according to the figures you just stated there? A. If I may show you this, which is the identical sheet to the exhibit which you have, and which I have simply done the necessary subtraction—I think they can show you the relationship. This is Mr. Hoover's and this is the Southwest Guthrie Quarter—I mean 40. Using only the places where the contour lines have crossed, the north line, and applying them directly against the glide angle plane which is level, 119, 124, 119, 129, 143 from the ground level, only two cross down here and one almost 150, 156 and 161 feet.

Now, on the north 40, I believe you mentioned Mr. Guthrie's tract. At this point as well as you can judge extending this contour over here about 163 feet, 157, 143, and I believe this is the center line of the 40, and there on up. It appears to be 12 feet here by subtraction from the contour line. 163 would be about 40 foot higher here.

Examination

By Mr. Tisdal:

Q. That is the north edge? A. Yes, it goes up from here.

387 Q. From here up to where? What would this from here down to here be? A. As well as I can read the figures, it enters here at 67 feet to 123. It would be the 56¼ feet rise from here to that point, which is south of the center line.

Q. This would be on the South 40? A. On the Southwest 40.

Q. How did you arrive at your figure of $700.00 damage on the Guthrie land, and then on Hoovers down there you have a figure of $1,600.00, when Hoover's come in at 105 feet and when Mr. Guthrie's comes in at 71 feet and goes out at 63 feet. How did you arrive in the difference of $700 and $1,600.00? I am just asking for information. A. As you recall, the main part of this clearance easement that gets anywhere close to him is clear down a half of a mile from his improvements at all, it sets clear down here. When it gets over his house, I think the house itself is about 140 feet below the glide angle plane, also his barn and garage.

Q. Does Mr. Hoover have improvements there, that you have included in that figure? A. No, Mr. Hoover has improvements across the road.

Further Direct Examination

By Mr. Camp:

Q. Tract No. 124E, explain that valuation to the Commission at this time? A. The value as a whole enters into the value of the whole property. In my opinion they did not lose value as such as an imposition of the easement, however, this property over here did lose value as an imposition of the easement.

Again getting back to the question, we are dealing here with the best land Guthrie has, if Mr. Hoover has any $150.00 land this is where it has to be. This land is where it is best located, along the east and west road, that is where he put his house. The blacktop road is just a half-of-a-mile to the west. However, up here on the other

388 tract we are dealing with land, up in Mr. Guthrie's tract instead of dealing with $150.00 land, we are dealing with land that is a good deal less valuable. I have estimated his value contribution, land contribution, something about like $125.00 to $150.00 per acre.

Mr. Guthrie's land is all worked out on the exhibit before you, at about $61.00 an acre on his steep Dill, and about $85.00 on his Cobb. You are dealing with land that is about twice as valuable on Mr. Hoover than you are on Mr. Guthrie, and this value is pretty well established by his own purchase across the road. You have a substantial difference in location and soil quality. Land less valuable, loss of value per unit, and bargaining position is much less. If you are dealing with higher priced property the seller will not let him save so much money, and I tried to reflect that in that estimate of damage. Does that give you the reason, sir?

Q. Where is Mr. Guthrie's best quality land? A. May I show you from my aerial here, sir, my tracing of it? All of his cultivated land is on the west part of his property, lays back west of the house. The draw separates it off in the corner. The best land is along this ridge, in my judgment.

Q. In this portion it isn't cultivated at all? A. This over here is not in cultivation.

Q. It doesn't effect his cultivation? A. No, in my opinion.

Mr. Meachem: You mean it doesn't affect his use? A. His agricultural use.

Examination

By Mr. Tisdal:

Q. His rough land is on which side? A. His rough land is out from under the easement area. The east side of the place.

389 Q. The easement is where? A. West side, approximately west of this line here.

Q. In other words this is cultivated land? A. That is correct; his best land is the land under the easement area, and it is about $85.00 an acre land against $150.00 land.

Examination

By Mr. Gillespie:

Q. Mr. Davis, I am still not satisfied in my own mind here as to your differentiation here as to what you call buyer's resistance as between the Guthrie and the Hoover tracts. You say the buyer's resistance in valuation here on the Hoover tract is $400.00, and the easement effects only 40 acres; then referring to your Guthrie tract, you only make a difference of $200.00 in buyer's resistance when the easement on the Guthrie tract covers 83.70 acres? A. The reason in my judgment there is a greater buyer resistance on the Hoover tract. That in that particular tract we are dealing with a tract of land that is higher priced land, and is better located. For example, in the 40 acres on the Hoover tract, at I believe $150.00 an acre, indicates a $6,000.00 package all there in one handfull, well located. In the matter of Mr. Guthrie's tract however, we are dealing with land that is in the class of about $85.00 an acre land, and while it does cover an 80 acres, being a total of $6,400.00 roughly in value, it is a different type of location. To get to Mr. Guthrie's house you go down the ditch and come back up. You are on the northeast and northwest road that is not as desirable as the north and south road as Mr. Hoover's. You are on the opposite side of the base where there appears to be a little different desire of the buyers; with soil selling substantially south and west of the base where the Hoover is located. You are getting over the end of the line on Guthrie. They used to say of certain farms that the insurance company owned that he was up toward the end of the road. That makes a difference in the market, makes a difference in the bargaining position.

390 Mr. Guthrie has a nice place, set up for a dairy operation and that will sell to a dairyman. He will have little patience to a guy that tries to save too much money that wants to buy. Mr. Hoover with better land and better location is not in as good of position to protect himself, only though he has 40 acres setting on top of everything, setting in everybody's sight. He would have a different type of buyer, different type of land use. That is why I estimated a greater loss on one than the other.

Examination

By Mr. Tisdal:

Q. In buying and selling land would you find that where land lays in the quarter section, and where it is divided by a road, would there be any difference in the valuation of the property? A. It has been my experience that generally folks prefer to have their land in one body. I can sometimes find a little difference in the price they pay when it is that way. However, in recent years since the cost of machinery has gotten so high premium paid for isolated pieces appears to remove that differential, and I don't think you can find it now.

Q. I was looking here on the board that you have up there. Now, the Rogers land is the same type of soil practically as the Hoover land, and you have the Rogers land at $185.00, the Hoover at $195.00, and you have the improvements of the Hoover much cheaper than the Rogers, I mean the total overall, that is what I am talking about $185.00 and $195.00.

Mr. Camp: Is there a difference there because of the minerals?

The Witness: Yes, and improvements. In one case you are dealing with all of the minerals and the other one-half.

Q. One was split and the other wasn't? A. I wouldn't believe the market would show any decrease in valuation at this time, it used to be but the pattern has changed some.

391 Further Direct Examination

By Mr. Camp:

Q. We will move to 123E. A. Before we move may I finish a little more answer to your question, sir? You see in each case I have valued the same land classification at the same price per acre without regard to buildings or minerals, and your principal difference between the two is minerals, and this made the value of the Dill at about $150.00 in each case, and of the fine sandy loam that was west of the ditch, or in the pasture at about $125.00. I have used the same unit value on both tracts, the difference is in the minerals.

Examination

By Mr. Tisdal:

Q. In other words you are classifying it in this case Dill fine sandy loam and Cobb at the same price? A. No, they are all Dill. Both of the properties are approximately as I recall all Dill, and one of them is a little looser than the other one.

Q. You mean all of the Rogers and Hoover land is all the same type of soil? A. Let me call your attention to Exhibit 16, they are listed as about the same type of soil on both of them.

Q. This strip right here, isn't that Cobb here, and this is Dill? A. I did not so read the map, sir.

Q. The way I read the map this is Cobb and this over here would be Dill, and this right in here would be a Dill? A. There could be a soil change as you go west. I considered them as being in the Dill classification, and they are close enough to be—they are close enough they could be switched either way, sir.

Further Direct Examination

By Mr. Camp:

Q. Directing your attention to 123E. Are you familiar with the tract in question? A. I believe that we
392 have previously agreed that all of it has been settled except the one-half remaining mineral interest, lessor's mineral interest. I will ask you this question, have you studied the particular tract and that ownership? A. I have.

Q. And have you reached a conclusion as to the before market value of it? A. I have in my case if I may get it, sir.

Q. In as much as the only interest is the lessor interest in the minerals, have you made a study of that to determine whether or not there is any difference in value of before and after that imposition on that estate? A. As I understand the spacing requirement, it is my judgment there would be no loss in value on Tract 123E to the minerals as a result of the acquisition of the clearance easement.

Q. Now then, I believe all of the tract that remains is under the Davis ownership.

Mr. Camp: We move the admission of Government's Exhibit No. 28 at this time. If we did not move the admission of Government's Exhibit 27, we will do so at this time.

Mr. Whiteside: Those exhibits will be admitted.

Reporter's Note: The exhibit above referred to are attached to the original copy of the Transcript only.

Mr. Camp: We move the admission of Government's Exhibit 29, another exhibit being created in Court.

The Court: That exhibit is admitted in evidence.

Reporter's Note: The exhibit above referred to is attached to the original copy of the Transcript only.

393 Mr. Camp: We move the admission of Government's Exhibit 30 in evidence.

Mr. Meacham: No objection.

Mr. Whiteside: That exhibit will be admitted in evidence.

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Q. Sir, directing your attention to the Davis tract, the first tract being 1-18E. What sales did you consider most comparable, and what method did you use in the before value? Tell the Commission what you did in taking into consideration this particular tract? A. In estimating the value of the Davis tract, before the acquisition of any part, I relied upon those sales which were nearest to it and of most recent date. The Davis is outlined on three sides with red, and the west side with blue. On Exhibit 15 at the point I am pointing on the map. The sales I placed principal reliance include the Schneberger sale which is just across the road from it and made in 1957—in 1958, and the McDonald sale which corners it to the south so to speak, and it adjoins the Schneberger sale down the blacktop road, which is a 1955 sale. The Duree sale which is to the east of it, and being shown on Exhibit No. 9 at a little up of center on the left hand side and to which I am now pointing, and of course Mr. Davis's purchase which he made himself of the tract being involved in this matter which he bought in 1954. For your convenience I have placed on the sheet my analysis of each of those sales. Mr. Schnebergers sale was 160 acres bought in 1957, it is my understanding that he got half of the minerals, and that the total price he paid was $193.75 an acre. The buildings were, while not being used, in my opinion did contribute $10.00 an acre, and minerals about $15.00, leaving the surface cost of about $168.12

an acre. It is my judgment that that soil is Cobb fine sandy loam, it is all in cultivation except a little area around the house, which is shown by the aerial photograph and the shelterbelt along the south line fence. The area
394 around the house being in timber and trees, and the shelter belt being along the south side. The total price there is about $168.00 an acre for that particular soil.

McDonald, to the south of it and showing trees on the center as on Exhibit 15, it is a 1955 transaction, again half of the minerals involved and 160 acres, total price paid $134.37, and buildings he got being minor contributed about $3.00 an acre, minerals $15.00, leaving the surface at $116.25 an acre. In this case the soil was a Dill fine sandy loam. He paid about $117.50 for it, and he had a little rolling land or Dill loamy at $105.16.

Duree, it was a 1956 transaction, total price $200.00 an acre, in my judgment the buildings contributed about $43.75 an acre, minerals about $15.00, leaving about $141.00 per acre for the surface; and that was Cobb, and again that would be about $141.25 an acre for the Cobb.

Mr. Davis' purchase in 1954, as I understand it, he bought exactly the same tract that is involved in this matter, and is shown on Exhibit 16 and Exhibit 9 as I have indicated.

Q. How near to the date of taking was that, approximately? A. The value date on A118E was in 1956, and the purchase was in 1954, and the deed dated October 16, 1954, so it was probably a year-and-a-half approximately from the date of the acquisition of the first clearance easement. It was a 60 acre tract, as I understand he got half of the minerals, he paid $83.33 an acre. The buildings at $11.00 an acre, minerals at $10.85, and that leaves about $60.00 an acre for the surface, and about $67.51 for his better land, and for his Dill loamy about $40.00 an acre.

Utilizing these sales they indicate a total value in 1956 of about $134.00 an acre, the buildings contributed about $18.00 an acre, the minerals $17.50 an acre, leaving a surface value of $97.00. For his best land about $109.00 for his rolling land—I mean about $109.00 for his Dill fine sandy loam and about $65.00 an acre for his rolling land. In my judgment that is about the way the market value was at that date.

395 Q. Using these considerations did you arrive at a before valuation on Tract 118E? A. I did.

Q. What was that figure? A. The total before market value, including the lessor's value, was $8,050.00, or about $134.00 an acre.

Q. And using these and your other considerations in the study of the area, did you reach a value as to the land after the taking of 118E? A. I did.

Q. What was that figure? A. It was my judgment that the total market value of the Davis tract after the imposition of the easement covering Tract 118E was $6,950.00, which is about $115.00 an acre.

Q. And how did you arrive at that difference? A. A portion of the difference in my judgment was due to a loss in value of the land due to the imposition of the clearance easement. The first easement entering the north property line at something about 32 feet above the ground level and leaving it at approximately 85 feet, and covering about 15.25 acres out of the 60 acres. The loss in value to it due to the clearance easement as it affected the land alone, in my judgment, was rather nominal because it would not interfere with the farming of the land, at least as far as the better land was concerned. It would be more of a bargaining matter in the matter of sale. While it is true that on the north end of the tract that the 32 foot height it would be not as desirable, while it is true that the buildings were at the north end of the tract it is my understanding they were still below, substantially below the glide angle plane and were not affected by the acquisition. I therefore considered that acquisition was more or less of a bargaining loss to the owner of the tract, and that he would be willing to accept a loss there of something like a couple of hundred dollars due to the loss in land value alone. That is about all the buyer would be able to save. However, this is
396 not true when it comes to minerals. The minerals, in my opinion, contributed about $17.50 to the whole before the acquisition. After the acquisition the contribution would be reduced to about—would be reduced $15.00 or for about $900.00 in value loss. Making a total value of loss of the acquisition of about $1100.00.

Q. Then only the lessor's mineral interests were considered here that had a lease on it? A. Only the lessor's mineral interest has been considered.

Q. I believe Mr. Wilcox when he was testifying compared this land with our Sale No. 24, being the Northeast of 28, and stated in his opinion the Davis tract was much superior soil. Would you discuss that factor as you see it? A. As I observed the two tracts, and as I observed the crops now growing on the remaining portion of the Davis tract, there is no question in my mind that the soil on the *Schnegerger* sale, Purchase No. 24 I believe it is, is quite a bit more desirable than any of the dirt that I saw on Mr. Davis' tract, and I believe that was recognized when the purchaser made his buy, and I think that was also recognized when Mr. Davis was able to buy his land. That had the tract been as fertile as the land to the west of it he might have had a different cost.

Q. We will show you a sheet having two pictures on it, one labeled chicken house, the house, and typing Tract 118E, 142 and 142E, Robert Davis, and ask you what that is? A. These are the pictures of the house and chicken house on the Davis tract, prior to the removal.

Mr. Camp: We move the admission of this exhibit in evidence.

Mr. Whiteside: That exhibit will be admitted.

* * * * * * * * * * *

Examination

By Mr. Gillespie:

397 Q. Does Mr. Davis own all of the minerals under his 60 acre tract? A. It is my understanding that he has the lessor's interest in the minerals.

Q. I am not talking about the oil lease, I am talking about the mineral ownership. Is there any reservation of minerals by any prior owner, or royalty owner? A. I believe there was a reservation of half. Let me check for sure—the deed showed one-half of the minerals reserved.

Q. That is in the entire 60 acres? A. Yes.

Mr. Meacham: Are you sure that is right?

A. As I read the deed last week it was my recollection that it conveyed half of the minerals.

Q. That is on 118E? A. We are talking about the 60 acres which has been imposed the easement on Tract A-118E.

Examination

By Mr. Tisdal:

Q. On this valuation of minerals—in other words you are valuing that at $17.50 an acre? A. That is correct. His interest in the minerals at $17.50 an acre.

Mr. Gillespie: No lease on it, as I recall it at the time? A. I think that is right.

Examination

By Mr. Tisdal:

Q. In regard to the minerals, you consider the leased minerals or unleased minerals more valuable? A. It is my judgment, sir, that whether the minerals are leased or not leased does not add to their total value; but that when they are leased the value remaining in the owner of the land is lessened because there is another interest that can be maintained on indefinitely by meeting the terms of the lease, and I have so considered.

398 Q. You mean unleased minerals has the same valuation as leased minerals, is that right? A. That is a true statement. That the total sum of the mineral value unleased is equal to the sum of the mineral value remaining in the landowner and lessee after being leased. The distinction I make in my mind, if they can be leased they will be worth more money, but the fact they are unleased would not make any difference.

Q. If I get you right, you can take a piece of minerals in an outlaying district and it is worth as much as a piece of minerals where they are drilling next to it, is that right? A. No, that is wrong. What is right, that the minerals in the outlying district not under lease are just as valuable as though they are unleased, and the minerals in the active area where they are drilling and getting production are just as valuable in the owners hand as they are when they are divided between the owner and oil company. The sum of the parts may not exceed the value of the whole.

Q. On this Davis, the 32 feet on the north line and 85 feet on the south line, is it possible that an oil company will go on and retain a lease, pay the delay rental on a strip of land like that?

Mr. Camp: It has been previously stipulated that they did so in this particular tract.

Q. I was asking him his judgment. A. It is my judgment they would be guided by the way they viewed the territory, and if they thought they had something valuable they could unitize or assemble with something else they would probably continue to pay the delay rentals. If they didn't, and wanted to get rid of the lease anyway, this would be an excellent opportunity or good *escuse.*

Q. In other words if they go ahead and pay the rentals that is more or less an indication that the minerals is of some value? A. It indicates at least they feel there is some value, yes.

399 Examination

By Mr. Gillespie:

Q. Mr. Davis, could you be mistaken about this mineral ownership on the tract? A. That is right, and I suggested to counsel we get a certified copy of the Deed.

Mr. Meacham: These other two gentlemen say they have checked the record and Davis does own all of his minerals, and no other party is a party to the suit. His figures are just exactly right, but I think he might be confused with the other sale in which there was half of the minerals reserved.

Mr. Davis: I will stand corrected.

Mr. Meacham: If the Court wants it, we will send down there and get a certified copy.

Mr. Camp: I think the conclusions as you say, the figures are right he has reached, it is only there was an error in the various Davis ownerships.

Mr. Meacham: We want to be sure that we have made a record that we do own all of the minerals. If it takes a certified copy of the Deed we will send down there and get it.

Mr. Whiteside: Can't you stipulate?

Stipulation

It is stipulated that the records reflect that Mr. Davis owned the entire mineral interest under the 60 acre tract, subject to his oil and gas lease, and later subject to certain other leases.

Mr. Camp: With the Court's permission, and while Mr. Smith is here, to clear up a matter we believe there might be some *misunderstand* about on Tract 119E. When Mr. Smith was on the witness stand he mentioned a
400 $900.00 figure in a letter including the removal of some trees, and I believe it is agreed at this time by his counsel and Mr. Smith that that figure was in connection with the acquiring of a roadway easement across Tract 119E.

Mr. Meacham: That still hasn't got it. Mr. Smith has made some negotiations with the government with respect to a roadway and 30 trees. He and the government have settled that matter between themselves, and they have agreed or have paid him for those trees. It is stipulated and agreed that this lawsuit is not going to require Mr. Smith to tear down any trees in connection with this lawsuit.

In other words that would mean that was a different deal, and therefore the shelter belt or those trees are not involved in this lawsuit.

Mr. Whiteside: In short, the letter referred to had nothing to do with this lawsuit?

Mr. Camp: That is right, it had to do with a roadway.

Mr. Meacham: I wanted Mr. Smith to understand it thoroughly, and it is now cleared up.

Further Direct Examination

By Mr. Camp:

Q. Mr. Davis, if I recall correctly there was some discussion as to the ownership acquired by Mr. Robert E. Davis in the purchase of a 60 acre tract, which 118E is a part, and in that connection are the figures which you have related here to the Commission based upon Mr. Robert Davis acquiring the full mineral ownership when he acquired the land? A. They are.

Mr. Camp: Are there any questions on 118E at this time, and before we go on to the other considerations of the Davis tract?

Examination

By Mr. Tisdal:

401 Q. I would still like to get it cleared up in my mind. You have one-half of the minerals there on account of it being leased, is that right? A. The reason for the one-half of the minerals is because a lease was in existence at the time.

Q. You mean to say that takes a half of the valuation away from minerals on account of it being leased? A. What I mean to say sir, that the value of the minerals remaining in the owner of the land after a lease is executed amounted to approximately one-half of their total value. It does not change the value of the minerals. It changes the value of the minerals in the then owner.

Q. In other words in this case here on 60 acres, he has got—before it was leased he had 60 acres, is that right? A. That is correct.

Q. And now he has got 30 acres, is that right? A. In effect, or he has half interest in an undivided half of 60 acres; either way.

Q. I think that clears it up in my *mine*.

Examination

By Mr. Camp:

Q. Mr. Davis, on your sales 24, 11, 15 and 16 you are discussing, these are minerals that were either sold or conveyed, and to be consistent would it not all on 118E, only this lawsuit is limited to that portion which is still owned, not leased? In other words, of royalty interest of Mr. Davis? A. That is not true. The sales vary, in some cases there were leased at the time sales were made and some cases there were not. As the exhibits have been made up, with the exception of the Davis tract, the divisions have been made on the basis of the reservation in the deed. For *example*, Schnegerger's purchase, he got one-half of the minerals, and he had no lease at the time of the transfer.

402 Examination

By Mr. Whiteside:

Q. Were any of these tracts shown up there, 24, 11, 15 or 16 leased at the time of the sale? A. Some of them were. Tract 24 was not under lease, Tract No. 11 was under lease to Mr. Fowler and transferred to the Gulf; Tract No. 15 was not leased at the time of the transfer, and Tract No. 16 was the full mineral interest transferred and under lease at the time of the transfer.

Q. Did Mr. McDonald receive—Mr. McDonald was the purchaser? A. Yes.

Q. Did he receive a whole of the minerals in that transfer? A. Mr. McDonald received half of the minerals, and the transfer was subject to a lease.

Q. Wouldn't it follow then that Mr. McDonald's interest in those minerals would only be $7.50 if he owned half of the minerals under lease? A. That is correct, that would indicate a higher price for the surface of $7.50 for the various classes, and I have made those calculations if you want to see it.

Examination

By Mr. Tisdal:

Q. You have it on the board there the amount of $15.00. In other words if he got half of them, and if it was under lease then that should be $7.50, is that right? A. Taking into account the lease.

Q. That up there is in error? A. If the lease is considered.

Q. You are considering the lease on Mr. Davis? A. I am considering the interest Mr. Davis had.

Q. Why shouldn't you consider this on McDonald? A. I can and will if you wish.

Q. To make the record clear I think it should be.

403 Examination

By Mr. Whiteside:

Q. Personally *ou* consider the mineral interest of Mr. McDonald to be worth $15.00. We don't want you to change these records with what we think, unless you think that is right? A. The point is, in analyzing the sales I have considered the mineral interests that were transferred in the deed without regard to the lease. In order to give it another look it is perfectly possible to include the considera-

tion of the lease in the value of each of the properties with which we are concerned. Of course, there are still a little difference in the sales, in some we have valued more. As I used the sales and this being the values of the subject properties, I considered them without regard to leases, and I have them considered with regard to leases. I would put them on the board if you want me to. I have looked at them both ways.

Q. I think to clarify those, I think we should know which ones had leases and which didn't. A. I am placing in ink on the exhibit the mineral interest considering the lease, and I am placing it on in green just above the black figures that had previously been on the exhibit. The mineral interest being on the McDonald Tract, 11, the price paid for the surface alone $123.75, the price indicated for the Dill fine sandy loam in my judgment $125.77, and for the Dill loamy fine sand, in my judgment is still stated about the same figure. Indicating the difference being on the better soil, and I have also considered the sale in that same manner.

Now, of the tracts that were leased or not leased at the time of transfer, there may be different situations now, in fact some of them are—in the Schneberger lease—I mean the Schneberger tract there was no lease. I am putting in green at the bottom of the exhibit and below each tract which—whether there was a lease at the time of sale, whether there were or not by yes or no.

The Schneberger sale, which is sale No. 24, my information was there was no lease at the time of transfer,
404 and I place the word 'no' below it; on McDonald there was a lease at the time of transfer and I place the word 'yes'; on Duree, it is my information that there was no lease at the time of transfer, and I place the word 'no'; and in the Davis, there was a lease at the time of transfer, and I place the word 'yes'. In *valying* the Davis interest however, I have valued only the lessor's interest, so I will have no comment below it.

Examination

By Mr. Tisdal:

Q. One other question. I believe if I understood you yesterday correctly, you said that in case a lease had run on a 10 year lease, say it would run 9 years and 11 months,

it was still worth half value on it, is that right? A. No, that is not quite correct. What I intended to convey is the fact that if the 10 year lease had run 9 years and 11 months, the holder of the lease may still keep it in force and effect by proceeding along with its terms and drilling a hole, and if he gets oil he is in business, and if he hasn't he has extended it far enough to find out, and it being therefor an indefinite thing. It is my judgment until the lease expires by failure to pay rental or by its own terms, that is the end of the period, or by failing to get production or whatever the thing says it should do, that until it expires in accordance with its terms, the owner of that lease, the lessee has the same interest that he always have had. His interest is just as strong on the last day as it was the first day.

From the standpoint of the worth of the lease, the lease would have, of course, have a lot different value, depending upon the time, but the owner would still be short everything that he ever gave away in my judgment, and I have so considered. I believe a buyer would look at it that same way, that he would realize that the lease could be extended by the terms of the lease itself.

Q. You think if you were buying royalty and if it was going to expire say in six months, that you wouldn't give as much for it as if it had already expired, is that
405 right? A. Well, now, let me be sure if I understand what we are talking about. If I were buying the farm with minerals intact subject to the lease, and the lease had six months to run, I would still consider the lessee had all the interests he ever had, and still had them up to the last day.

Q. I wanted to find out the valuation of the minerals. A. As I would value the mineral interest remaining in that farm, I would consider they were still subject to all of the value in the lease, if they lose half of its value.

Q. I still am not getting what I asked. I want to know if a lease has run 9 years and 6 months, if it is worth less or more, or as much as if the lease had expired? That is what I want 'yes' or 'no' to my question. A. If the lease has expired there are no interests outstanding. If the lease has any length of time to run, from the standpoint of the mineral portion of the farm ownership, it is my judgment that a portion of that has been transferred to the lessee and

is still in effect up to the last day. So there is a difference after expiration and before in my judgment.

Q. In other words it is worth less then, is that it? A. After the lease expires?

Q. No, before. A. Before the lease expires it is worth less, but the total minerals are worth the same. Do I make it clear, sir? The value of the minerals doesn't change, the value of the interests does change in my judgment.

Q. That is what I wanted to find out.

Examination

By Mr. Gillespie:

Mr. Davis, if I understand you on that, the value to the holder of the lease would lessen, but the value for
406 appraisements purposes wouldn't change as long as there was one day of life left in the lease? A. In my opinion it wouldn't change in the market as long as this man could still come in and continue that lease, the man owning the farm is still short whatever rights he gave. When that lease expires he then has everything he ever had.

Examination

By Mr. Tisdal:

Q. Have you ever bought and sold any minerals? A. I am the owner of some that are not profitable.

Q. Have you ever sold minerals? What I wanted to ask, which is the most valuable or saleable, minerals that is under lease or not under lease? A. It has been my experience that if minerals are leased they indicate an interest in the area, and thereby the total minerals are or have more value. When they are not leased generally that indicates there are less value there.

Q. That answers the whole thing I wanted to find out. In other words, leased minerals are more valuable? A. That is correct, the total minerals are more valuable, at *lease* somebody thinks they have some potential, or they wouldn't be spending their money.

Further direct examination

By Mr. Camp:

Q. Now then, it is my recollection that we have completely covered 118E, is that your understanding. Mr. Davis? A. I have given my estimate of the market value of the property upon which was imposed the easement known as No. A-118E, as of March 8th, 1956.

Q. Let me summarize here so the record will be clear, I believe it is, but to make sure. The value before taking on 118E was $8,050.00 and the value after taking $6,950.00, or a total difference of $1,100.00 in your judgment? A. That is my judgment, sir.

Q. Let's move on to the next tract, being tract 142.

407 Mr. Camp: We move the admission of Government's Exhibit No. 31 in evidence.

Mr. Whiteside: That exhibit will be admitted.

. . . . . .

Q. Now then, sir, explain to the Commission what you did in arriving at a before value of the tract, and the after value that was taken by 142? A. In estimating the market value of the Davis tract on March 4, 1957, just one year after the taking of the easement known as Tract A-118E and subject to the easement, in studying the market if is my judgment that he market increased in that period of time. I am speaking of the land market without regard to any change in value of the minerals, which I gathered have remained approximately the same. In the land and buildings Iestimated *there* value as of March 8, 1956 in the amount of $7,000.00 after the imposition of the clearance easement. It is my judgment that a year later, if this tract had been placed on the market subject to the same easement, to which it was subject a year ago, it would have brought approximately $1,000.00 more for the land alone, and I have accordingly estimated the market value of the land on March 4, 1957, including land and buildings, at a total of $8,000.00. I have estimated the same mineral value as was estimated after the taking of the easement in 118E, making an estimate of value before the acquisition of Tract 142 of $8,150.00 or $132.52 an acre.

Q. Have you also reached an opinion as to the value after the taking of the 15 and a fraction acres? A. I have.

Q. What does that—what is that figure? A. It is my judgment that the value of the approximately 44.51 acres remaining after the taking of the 15.49 acre tract, is in the amount of $5,410.00, or about $121.00 an acre for the remaining 44 acres.

Q. How did you reach that conclusion, sir? A. I reached that conclusion by valuing lands—by valuing the
408 remaining land after the portion was acquired, the portion being approximately 15 acres, and the land remaining there being reduced from about 45 acres of the best land down to about 39 acres of the best land remaining, and 15 acres of rolling steep phase Dill loamy fine sand, reduced to about five (5) acres, or five-and-one-half (5½) acres after the acquisition of the Tract A-142. It is my judgment that either of these soils lose any value as a result of the taking, it is the same; the loss in value is due to the area taken. The same is true of the minerals, that is only 44½ acres remain, to which the residual value applies, and I have so considered it, making a total loss in value due to the area taken of approximately $2,740.00.

Mr. Meacham: Is this really 142E, or is this the fee taking.

A. The fee taking.

Q. And you are using the value before of the 60, and the value after of the 45? A. That is right.

Q. Mr. Davis, did you take into consideration any sand or dirt having any particular value on this property? A. In inspecting the property I found the 15 acres, before any acquisition, that is classified as Dill loamy fine sand, as steep *rooling* land, about 12 or 15 feet higher than the cultivated land. It is sandy type of pasture land like a great deal of other similar land in the neighborhood, and as far as I was able to judge, and as far as I could judge from purchases and sales of similar land it would simply be treated as undesirable land, and not as valuable land, and I did not find it to be considered generally as land having value for construction use in the general market. The fact in discussing it with the highway people, I found that they did not use material of that sort. In discussing with construction people at the base I found that it was used primarily for fill, and that they bought fill to go
under the runway and pads, not only from Mr.
409 Davis but from Mr. Merz on the north, and also

others. There was, as far as I was able to observe, there was a great quantity of this material in the neighborhood. I did not find that it added any value to the property, other than its agricultural use or agricultural value only.

Q. Did you attempt to calculate the cubic yardage that Mr. Davis used in reaching a value, did you consider that; if you did not would you say why you did not? A. I did not consider the procedure of taking the yardage of material in place and multiplying it at a figure at which it might be sold, because I am advised by counsel that is not a proper method of estimating the value of the whole. That even if there were mineral there to be considered it would have to be estimated from sales of similar tracts with the material in place, and not by a number of units times a proposed price per unit.

I therefore did not consider it on that basis. I considered it as a—I considered it as the market considered it as poor agricultural land.

Q. What consideration did you give to the building, or was there a building—some of these buildings that is in evidence were they on this land? A. The buildings were on the land before the acquisition of Tract No. 142; at that time of acquisition of Tract A-142 the house was acquired by the acquiring agency and the tract as it remained only the out-buildings and the land, and of course the well, I believe, is still on the site remaining.

Q. Did you take that into consideration at that time, or did you know that the house had been purchased for $5.00 by Mr. Davis? A. I didn't know of that purchase at the time of the appraisal.

Q. What value did you place upon the house? A. I estimated the contribution of the house to be before the acquisition of Tract 142 at $1,175.00, and chicken house at about $50.00.

410 Q. Sir, directing your attention to 142E, you are familiar with the estate taken in that, are you not? A. I am.

Mr. Camp: We move the *admittion* of Government's Exhibit 32.

Mr. Whiteside: That exhibit will be admitted in evidence.

* * * * * * * * * * *

Q. Did you, applying these same sales considerations, and after this same inspection and investigation that you have been testifying to, reach an opinion as to the total before value of Tract 142E? A. I estimated the value of the Davis tract subject to the taking of Tract A-142, and the taking of the tract A-118E, before the acquisition of the easement known as tract A-142E, utilizing the same sales to which I have previously referred.

Q. Did you reach an opinion as to the value of the remainder of the land that was left before 142E was imposed? A. I did.

Q. What was the value of that? A. It is my judgment that the remaining land prior to the imposition of the easement known as Tract A-142E was in the amount of $5,410.00, which is approximately $121.54 an acre.

Q. After the imposition of 142E on this land, what was the value at that time of the ownership of Mr. Davis? A. It is my judgment that this value of the remaining ownership was in the amount of $4,310.00, or $96.83 per acre after the imposition of the easement of the tract known as 142E.

Q. How did you come to that conclusion? A. In estimating the loss in value due to the taking of the easement I relied primarily on two sales of land to the north of the tract, both sales having been subject to identical
411 easements, being clearance easements, and having been sold in the market to the neighbors for their use.

Q. Are those sales 18 and 19 on the sales map previously introduced? A. The sales No. 18 and 19 are on the sales map previously introduced, and are shown on Exhibit No. 14, the long blue colored section being sale No. 19, and the sale below it on the map being sale No. 18, which is the sale to Mr. Johnson.

Q. Would you discuss in more detail how you studied those and used those in reaching your values here in 142E? A. In each of these tracts there was a clearance easement

covering the east 280 feet, as I am pointing to Exhibit 14, that would be a little more than half because the total width of the tract is 455 feet, I believe, leaving 175 feet on the west side not subject to the easement. In the larger tract as I am pointing to it on the exhibit 14, that would leave about 16.99 acres subject to the clearance easement, and 10.16 acres not subject to the clearance easement. Now, the east line of the clearance easement as well as I can understand, puts a height limitation of 13 feet above the existing ground level. The west line of the easement area, which is 280 feet to the west permits a height of 53 feet. This particular easement is what is known as a sideboard, and rises at the rate of one (1) foot in every seven (7), thereby accounting for the 53 foot height against a 13 foot height at the beginning.

Q. When you say it is known as the sideboard, in the pleadings it is transit canal plane? A. Yes, and in my thinking it is pretty well compared with the sideboard of a box wagon, holding out where you can hit the box. The same easement applied to Tract 18, which is the south tract, the south end is subject to an easement. Both sales were made subject to the easement of record. Considering these sales, I considered the fact that they sold for $108.00 an acre in 1957, and that they were sold to neighbors who were familiar with the area, and in my judgment were fully familiar with the restrictions placed upon them; and
412 in discussing the matter with one of the buyers, and it is my judgment that he anticipated no problem from an agricultural use in his purchase. In comparing these tracts which sold in the neighborhood, I compared them with Sale No. 14 which is immediately to the north of the tracts, and I believe that the McDonald sale—the McAllister sale, Sale No. 14 is the McAllister purchase and is to the north of the tracts, and has some of the same kind of soil on it, and Sale No. 10, which is the Walters sale. In considering this particular tract and the sale, I compared it with the sale to the north which is Sale No. 14 and is the McAllister sale. The sale to the west of it which is sale No. 10, and on Exhibit 14 was the sale by Mr. Walters, and shows also on Exhibit 15 as to the sale to Mr. Walters. I compared it also to the sale on 24, which is the Schneberger purchase to the south of it. In analyzing the purchases it is my judgment that the Cobb fine sandy loam

on the north tract which is the unimproved tract, bought by Mr. McAllister was *bouht* at about $140.00 an acre, the sale due west of it which is Mr. Walters' purchase, when he was the purchaser of this larger tract, in my judgment he paid about $153.00 for his Cobb, and on the Schneberger sale which is across the road and south of it, he paid about 168.00 an acre for his best Cobb fine sandy loam, and I judge that in this case when Mr. Walters bought this little piece out from under the easement of about 10 acres, he paid about $40.00 an acre, which would be about $125.00 an acre. In my judgment that is about a $40.00 an acre discount of size.

If we turn that around and start out with $125.00 an acre and add to it the $40.00 discount for size, and add to it the minerals which certainly have only residual value after this acquisition, this would indicate that the land would have sold for something in the neighborhood of $190.00 and/or $195.00 per acre, if it had been in a normal size, a quarter section or thereabouts, and it had not been subject to any restrictions. I therefore considered that this land out from under the easement actually sold for about $125.00 an acre, and that the remaining purchase price was for the price subject to the clearance easement which
413 is about $89.00 an acre, or about $26.00 or $27.00 an acre reduction. I have recognized in neither case would the minerals useable. I recognize there would be no effect on the agricultural use of the land, but in analyzing the sale I have recognized there a small piece subject to local buyers, not one that could be sold from someone from away, and therefore the seller being at the *merch* of the local people and that it was subject to this easement on the east 280 feet. I believe therefore about $125.00 indicating about $165.00 for the land alone, in a normal situation is about the way they actually bought this tract, and I considered it in estimating the loss in value to the Davis tract as a result of the taking.

Q. Have you viewed the crops on the Davis tract and the tract to the west recently? A. I have.

Q. And to sales No. 18 and 19 which you have just testified about? A. Yes.

Q. How do they compare at present? A. At present, crops on the Schneberger purchase across the road to the west from the Davis tract, and on these two tracts 18 and

19, are much better, and show evidence of a much higher yield than do the crops on the Davis tract. The crops on the Davis tract are definitely below par at this time for this area.

Q. Sir, there was no change, I take it, in the minerals? A. In my judgment there was no change in the minerals. They had already been subject to a restrictive easement limiting their development.

Q. What remains to be shown to the Commission? Are those other sales which you considered in this township or general area of the subject tracts, and at this time would you give us a very brief analysis of those sales and the factors you took into consideration in deciding whether or not to use them as the more nearly comparable sales on which you have previously testified? A. The remaining sales which appear on the sales map exhibited before
414 the Commission that have not been discussed in detail here include the following: Sale No. I, which is the sale to the east of the Merz tract and on State Highway 44. It was a 1952 transaction, improved, have an attractive little brick house, because of its location and because it is much better located, and much better nicely improved, and is compared—it is cared for better than the tract with which we are concerned, I did not give it principal consideration in estimating the market valuation in estimating this tract. I did give it some consideration, I had knowledge of it. That is Sale No. I.

Q. I will hand you what is marked Index Sale No. I, which is a picture, and ask you if you know what that is? A. That is a picture of the house on Sale No. I which I am now discussing.

Mr. Camp: We move its admission.

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A. I did not give that sale particular consideration for the reasons mentioned. Sale No. 3 was not mentioned in detail, it is an 80 acre sale shown on the same exhibit, in Section 18, it is a good two miles to the west of any of the properties with which we are concerned. It has a nice frame house on it which has been completely remodeled, because of its distance from the property at hand I did not give it particular consideration in connection with the individual tracts.

Q. I will show you what is marked Index Sale No. 3, being one picture?. A. That is a picture of the house on Sale No. 3.

Mr. Camp: We move its admission.

Mr. Whiteside: It will be admitted.

. . . . . .

Q. As we go along Mr. Davis, I previously advised the Commission that a break-down would be established upon our testimony. I believe we should at his time make a short break-down on the tracts as we go over them. A. In compliance with counsel's request, Sale No. I, a 1952 transaction, the total consideration was $35,000.00, or $218.75 per acre. Half of the minerals were transferred, the improvements were very good. In my judgment it was about a contribution of $10,000.00 to the value of the land, leaving the land value at about $156.25 per acre subject, of course, including the minerals. Or $140.00 with land only. Is that what that figures out? Estimating minerals at $30.00 an acre, that would be $140.00 for land only, half of the minerals were transferred and they were subject to lease, so there would be $7.50 per acre, leaving $149.00 for the land.

415

Examination

By Mr. Tisdal:

Q. What would be the change in valuation of that from 1952 to 1956? A. I don't know. It would sell in my judgment for more, I hadn't thought it through.

Q. In other words you haven't checked any places sold in 1952 and then sold along in 1956 or 1957 to see? A. Yes, we have checked all of the sales that have occurred, but this is a little different than the normal run. Here a man is spending $35,000.00 for a quarter section, whether he would go ahead and follow the same increase in market price as is indicated by the general run of sales, I think it is a little doubtful. Because you are getting into pretty good money when you are getting into $35,000.00 quarters. I therefore doubt it would show the same increase.

Q. Did you check the sale of Mr. Francis? A. I believe I have the information on it.

Q. Along in 1951 or 1952, the same time this sold. It is Sale No. 17. A. In response to the question last answered

concerning the Francis property, Mr. Francis bought the property from Mr. Newberry. The deed was dated
416 October 30, 1950 and is recorded in Book 233 at Page 246 in the records of the County Clerk of Washita County. The total consideration was $23,000.00 cash, a $5,000.00 note, and a credit of $2,000.00 rent for the South 80 acres for one year, being the year 1951, making a total consideration as well as I could gather it from discussing it with Mr. Francis of $30,000.00 in 1950. We have one-half of the minerals reserved for a period of 20 years at that time, there was no oil and gas lease at the time of the purchase.

Examination

By Mr. Tisdal:

Q. That sale was a full 160? A. A full 160 was his purchase.

Q. And was there any easement on it at that time, such as an restriction easement? A. There was no restrictive easement on it at the time of the purchase.

Q. Another thing, have they been part of the North 80 taken in by the Base or not since that sale? A. Since the purchase by Mr. Francis, the Air Base acquired 25.251 acres in the northeast corner, and I will show where it is if you would like for me to do it.

Q. I don't care to see it unless the others might want to see it. A. I think you might wish to have this information. I went back into my old files and dug it out, and I think I can show it to you here in relation to the Base. The Francis place originally was two 80's, a quarter wide and a mile long, extending north—as I am pointing, and south again as I am pointing. The road going west being at about the center of the base. The fee taking was in the northeast corner, being 500 feet wide and being 2200 feet long.

Q. How many acres? A. 25.25. They took that in fee, and in addition they took a clearance easement upon a limi-
417 tation of a number of people congregating or living habitation, and other uses, involving an area west of the fee taking, in the North 80, and to the south of the fee taking to about the place marked, and extending around the improvements about as I have drawn them. So that he had 84.751 acres subject to the restrictive easement.

Q. In that fee there was 25 acres taken, is that right? A. That is right.

Q. And then the restriction easement involved how much? A. 84.75 acres.

Q. That wasn't on there at the time Mr. Francis bought the place, is that right? A. That is correct.

Q. Do you know what he received from fee taking? A. I do not.

Q. Do you know what he received on his easement? A. I do not. I know my estimate of his damages in each case, but I do not know what the awards were.

Q. In other words that left him 100 and how many acres? A. The remainder was 134.75 acres.

Q. And he received, according to you here, when he sold it to Mr. Spradlin he sold it for for *$38.500.00* an acre, not an acre, but that is the sale price. You haven't figured up then how much there was in the increase in valuation from the time that he bought it up to the time he sold it, to get an estimate of what the increase would be on valuation of this other land? A. I have not tried to index that sale to an increase in values. I have analyzed it however to about what he got, by what he had left, and as well as I was able to judge I would be glad to so report.

Q. I would like to know what you consider the increase in valuation was for the years and from these others—you quoted sales there in 1954, 1952, and along there, and how much the difference there was in the increase in val-
418 uation of the land? A. I think I can calculate that for you in just a moment, sir, if you will permit me. As well as I can analyze quickly without figuring it through, and comparing the land before the acquisition of the restrictive easements with the same soil type remaining, after the easements have been imposed but not subject to the easements, that is land not subject to easements in the eight year period from 1950 to 1958, it would appear the land alone had increased by about 52 percent without regard to any change in minerals. That is the land and minerals, that is not them separate.

Q. That is from what date? A. That is from the purchase date which was October 30, 1950 to the sale date which was September 1, 1958, about 8 years it appears to have picked up on the same type of soil about 52 percent that is land and minerals.

Further Direct Examination

By Mr. Camp:

Q. That was Sale No. 17? A. Yes.

Q. Would you go ahead and discuss that while you are there and take care of this other phase? A. I did not use Sale No. 17 in estimating the value of the property at hand for the reason it occurred a substantial time after the value date on either of the takings. I further did not utilize the sale because it is generally better land than any of the properties with which we are concerned. It generally is in a higher state of cultivation, and with the exception of one set of improvements is far superior than any of the other improvements on the properties at hand. I therefore recognized that it was quite a bit better, and that I had sales nearer at hand that were more comparable and relied upon those nearer at hand.

Q. Were any of the minerals transferred there? A. One half of the minerals were transferred by the sale.

Q. You placed a value on the buildings about $8,900.00? A. Or about $66.00 an acre on the buildings.

419 Q. That land sold for $285.71 an acre. Were the land valued at about $205.23? A. That is right. In my judgment that is some of the best land down that way that has been sold.

Q. Sale No. 3 which we were discussing on the map, did that sell for $157.50 per acre with half of the minerals reserved? A. Yes, Sale No. 3 was $157.50 with half of the minerals reserved.

Q. You previously discussed the other phase of that. Sale No. 4, in Section 35. A. That was a 1954 sale by Mr. Sullins to Mr. Percy. It is on Highway 152, and is therefore two miles-and-a-half due south of the Base in Section 35.

Q. Did it sell for approximately $162.50 per acre, with buildings valued about $3,000.00, and half of the minerals reserved? A. That is correct.

Q. Did that give a land value on it of $128.75? A. I believe it gave an indicated land value of about $143.75 per acre, after the minerals were taken, and then taking off the minerals it would be about $128.75 for the land alone on the highway.

Q. Why did you take all of these sales that you have been testifying to, and the rest of them that were made, into consideration when determining the ones that you were going to use as the most comparable basis in your conclusions? A. I considered each of these sales, but relied more heavily upon those to which I have already reported.

Q. And that was so in all of the tracts? A. That is so to all of the tracts, all sales were considered.

Examination

By Mr. Tisdal:

Q. That sale in 35 here, I am interested in that. How do you classify that with this other land up there around the base? A. As I recall that particular tract, it is classified by the soil map and appears to be pretty well all Cobb fine sand, and is, I think, all in cultivation now with the house having been moved off even. I believe just a few buildings left. It is a right nice piece of land.

420

Q. Did you go over this place and look it over? A I looked at it, yes.

Q. Did you take in consideration anything of it from a sales standpoint, or water damage, or anything of that drainage, or anything? A. My notes show no indication of any lessening of the value of the property because of water damage. I believe when I checked it originally he was doing some irrigating there. I didn't see him doing any when we were here this time.

Q. You are talking of the Southwest Quarter of 35, is that right? A. Southwest Quarter of 35, in 10-19.

Q. And you saw irrigation on that? A. I have a notation they was in 1956, apparently some evidence of irrigation.

Q. You was out on the place, was you? A. I was on the place, and on the way across the road from the west of it.

Q. You didn't notice any damages there where there would be natural water? A. My notes do not so show, and I don't recall of seeing any.

Further Direct Examination

By Mr. Camp:

Q. Going to Sale 5, being in Section 20, 80 acres. Did you find that to have sold for $200.00 an acre, with a build-

ing improvement value of approximately $500.00, with 1/8th of the minerals previously sold? A. I did.

Q. Did that give a land value on it of $175.00 an acre approximately? A. It did.

421 Q. As to why you did not consider that, would you explain that? A. I did not particularly utilize this sale, although I did consider it because I had a sale to the east of it, being Sale No. 10 which was all an unimproved sale and nearer to the property being appraised, and more comparable, and I relied upon the sales closer and gave them greater weight.

Q. As to Sale No. 6, being in Section 12. Did you find that to have sold for approximately $141.25, with a building value of about $18.75, and mineral value at $12.50, making a land value only approximately $97.50? A. Yes.

Q. What consideration did you give to that? A. I considered this sale but did not give it the same weight as the other transactions. It is east of the highway, up in Section 12, it is in a little different country, and for that reason was not a persuasive in my mind of a sale more adjacent, and I considered the sale to Mr. Schneberger more than Sale No. 6.

Q. Did you study Sale No. 7 in Section 5. Did it sell for approximately $125.00 an acre, with about $4,000.00 worth of improvements, and half of the minerals reserved, or land value of only $85.00 an acre? A. That is approximately correct, sir.

Q. What consideration did you give to that sale, sir? A. I considered this particular sale, I did not give it the same weight as the Sale No. 2, the King sale to the east of it, because the King sale immediately adjoins the properties under appraisal, and I for that reason relied more heavily upon that sale than on Sale No. 7.

Q. Sale No. 8, being in Section 34. Did you find it in your judgment to be $150.00 an acre, with buildings of $3,000.00 value, and no minerals transferred, or land value of only $112.50 an acre? A. I considered that sale. I did

422 not give it the same weight as the other sales to which I have referred, because it again is on Highway 152, and a little bit nicer location as far as the highway is concerned, and it is a sale from a brother-in-law—between brother-in-laws'. I was advised it was a

full market transaction. I had other sales that in my judgment were more helpful, and I accordingly gave them greater weight.

Q. Referring to Sale No. 12, also in Section 34, did you find it to have sold for approximately $237.50 with half of the minerals reserved? A. Yes.

Q. What consideration did you give to that? A. I gave it some consideration, but not the same consideration to the sales which I have referred in my detail, because it is a well improved tract. It is only a quarter-of-a-mile off of a paved road, better location, and it is to some extent at *lease* a family transaction, having other sales that were more persuasive. I relied primarily upon the other sales.

Q. Did you consider Sale No. 13, which is off of the map to the west? A. I gave it very little consideration. I was aware of it, but it was a good five miles west of the area involved, and in my judgment was of very little help, and I have given it very little consideration.

Q. Did you consider the Sale No. 20, in Section 8, to have sold for $218.75 per acre, with no improvements, and all of the minerals bought, or land value of only about $188.75? A. I did.

Q. What consideration did you give to that sale? A. This particular sale was very close at hand to the area involved, being to the west of the base and immediately across the road from Mr. Francis' place. The sale was from a father to a son, and all of the minerals were reserved. It therefore, in my judgment was less persuasive of other sales not among relatives. I was aware of it but I did not primarily rely upon it.

423 Mr. Meacham: Did you take these pictures yourself? A. The pictures included in this group were taken at my request, and under my direction; at my request and checked by me.

Q. Were they all taken about the same time? A. All taken about the same time, and date of taking on that particular group would be in May or June of 1956.

Q. May or June of 1956? A. Yes, the latter part of May and the early part of June.

Mr. Camp: We would move the admission of a group of photographs attached to pages, which have the typewritten notations Index Sale No. 4, Index Sale No. 5, Index

Sale No. 6, Index Sale No. 7, Index Sale No. 8, Index Sale No. 11, Index Sale No. 12.

Mr. Whiteside: They will be admitted.

Reporter's Note: The exhibits referred to are attached to the original copy of the Transcript only.

Mr. Camp: That is all.

* * * * * * * * * * *

Cross Examination

By Mr. Meacham:

Q. Mr. Davis, if I understand you correctly, you are a farmer who milks cows. You have appraised for 28 years, you are presently a real estate broker in the State of Oklahoma, you teach, and you spend approximately half of your time appraising properties for the government. Am I correct, is that what you testified? A. That is approximately correct, for the various branches of the government, and the other for various corporations.

Q. You are milking cows right now? A. When I got the farm and got it paid for, I sold the dairy.

424 Q. How long has it been since you milked a cow? A. I believe I got the farm paid for in March of 1955, I believe and on April of 1955, about the 1st I had a sale, and that is the last time.

Q. Up to 1955 were you a farmer and a cow milker? Did that appraisement business interfere in any way with that operation of that farm? A. The appraisal business didn't *inteefere* with the farm, but the hired help certainly interfered with the appraisal business, and I got lots of experience I am sorry to say.

Q. And you are a real estate broker in Oklahoma right now? A. I have a real estate broker's license in Oklahoma.

Q. Do you buy and sell real estate in the State of Oklahoma now? A. No, except those matters which I have a personal interest.

Q. Have you acted as a real estate broker in the State of Oklahoma in the year of 1959, this year? A. I am a real estate broker in the year of 1959. I have not bought or sold any real estate in the State of Oklahoma in 1959.

Q. Did you in 1958? A. No, I don't believe I did.

Q. When was the last time you acted as a real estate broker in the State of Oklahoma? A. I believe the last of

the properties with which I was primarily concerned was sold in 1945 or 1948.

Q. Have you ever acted as a real estate broker in connection with land in Washita County, Oklahoma? A. I believe some of those tracts were in the area, some of the tracts with which I was concerned in my earlier days was in this area, and were sold under my direction.

Q. Your early day would be sometime ago, would it? A. I will say so, yes.

425 Q. Now, in regard to the minerals, you and Mr. Sidwell pursue decisively the same theory, is that correct? A. I have relied upon Mr. Sidwell's thinking, and have accepted it as my own.

Q. Under your theory, you and Mr. Sidwell's theory, the minerals at the north end of the base in the tracts with which we are here concerned, have a total aggregate value of $30.00 an acre, is that correct? A. Yes.

Q. At the south end they have a total aggregate value of $35.00? A. That is correct.

Q. When a landowner makes an oil and gas lease on his land, that moment the value of his mineral estate is decreased by 50 percent, is that your testimony? A. That is my testimony.

Q. And that diminution of value of 50 percent continues until that lease has expired by its terms, or been released? A. That is correct.

Q. Up to that very minute that same thing is true? A. That is correct.

Q. Now, when all is said and done really, let me see if I understand you correctly. All of these charts and breakdowns of sales on the easel here, all of these 10, 20 or 25 maps, as far as the Merz brothers are concerned, boils down to this: Their minerals were decreased in value by $4,000.00? A. That is correct.

Q. Based on what we have just previously discussed in this cross examination? A. That is correct.

Q. There was a $25.00 figure, they had something left so you gave that a value of $5.00 an acre? A. That is correct.

Q. And their loss was $25.00 an acre on the whole 160? A. Yes, sir.

426 Q. And their remaining, they had $1,900.00 damage by reason of the fact that they had to move all

of the improvements on the place, that was your testimony? A. Yes, they had a loss in value of $1900.00 to the improvements, a part of which was occasioned by moving, and a part of which would be occasioned by new construction.

Q. Everything they had was above the glide angle path? A. Only one building that was above the glide angle path.

Q. Why in the lower left hand corner of the exhibit which is of the north approach to Clinton-Sherman Air Base, in detail, gives the improvements on the Merz property that are affected by the glide angle path in this litigation, with the details as to the extent they are effected, is that correct? A. I believe there is such an exhibit already introduced that shows that.

Q. Under taking A-104E is detailed those encroachments that were existing on March 8, 1956, is that correct? A. That is correct, and refers only to one building being within the encroachment area.

Q. But all of those the Court can read that, and what that says is correct? A. As I understand it the house and windmill were the only two buildings that appeared to be within the glide angle plane as reported by the north approach clearance easement map.

Q. And that is your estimate now, the minerals were $4,000. and in your opinion the improvements were decreased $1,900.00? A. Yes, sir.

Q. And that would make a total of $5,900.00, is that correct? A. Yes.

Q. No part of that has anything to do with these charts here on this easel, or were on any of these maps and that sort of thing? A. I don't believe it does.

427 Q. After all Mr. Davis, what the Court and all of us, and that is our trouble, we are making an educated guess to what a willing buyer and what a willing seller would do, isn't that what it really boils down to? A. No, it does not.

Q. What are we doing? What would you say that we are doing? A. What I am trying to do is to bring to this Commission the results of a rather careful investigation, the best I know how to do in this area, of the market value of these properties before there is any acquisition and the market value after the acquisition, so they may utilize both the factual information I have relied upon, and the

opinions I have drawn from that factual information in estimating the just compensation which is their province.

Q. Which all boils down, you studied all the factual information, you make the charts, I am not *critizing* you, I think you are very fine in all of this, but it really boils down to an educated opinion, your educated opinion based on these facts as to what you think a willing buyer and a willing seller would arrive at, is that correct? A. That is not quite correct. One may guess and one may have an opinion without facts. When one utilizes judgment, there must be some foundation. I have been trying to bring the best judgment. I fenced it in with all of the facts I gathered, it is a different thing that opinions or guesses.

Q. Different appraisers even in your office will vary in their ultimate opinion as to the value of property, isn't that correct? A. Even within my own organization, or experienced people will vary as to their considered judgment as to the value of a parcel of property, and that is quite proper and normal, but it must be based upon all of the facts and careful study of the property, and then their judgments may be given credence and reliance placed upon it.

Upon the Merz minerals, $4,000.00, and the $1,900.00 makes $5,900.00, and here we haven't gone into the material on any of these charts. That leaves a balance
428 of $8,250.00. That really is your considered opinion as to the diminution of the value to the surface only of the Merz tract by reason of the imposition of an easement 13 feet on the south side, 50 feet in the middle, and 70 feet on the north side, is that correct? A. That is my judgment as to the loss in value that may be attributable to the land only.

Q. Let's see if I remember just how you arrived at that figure. You figured a decrease in the market value of approximately $25.00 on a portion of the land, is that correct? A. On the south 80, yes.

Q. $25.00 on the South 80, and you multiplied that together and came out with $2,400.00, but there was some factors enter in, when you came out it was about $2,350.00, is that right? A. That is not correct. I estimated the market value of the land remaining after the taking, and subtracting that from the value before the taking, and the

per acre figure is simply a mathematical calculation. An estimate is made by estimating the value as—the value after as a whole.

Q. That was $25.00? A. And it results in a loss in value of about $25.00 an acre.

Q. You mutiplied that $25.00 times 80, and came up with $2,350.00? A. No, I did not. I found the $25.00 by dividing the 80 acres into the total loss in value on the 80, and found then the $25.00 to be approximately the figure; entirely different view, sir.

Q. How did you arrive at $2,350.00? A. I arrived at the $2,350.00 in this fashion: On the South 80 before there was any acquisition, without regard to the improvemnts, I estimated the 70 acres of Cobb fine sandy loam and the 10 acres of Dill as having a total value of, or before of $7,900.00; after the acquisition of the easement, and again without regard to improvements or minerals, I estimated that the 56.7 acres of Cobb that was subject to the clearance easement and the 13 acres that was not subject
429 to the clearance easement, and the 10 acres of the Dill that was subject to the clearance easement contributed about $5,580.00. The difference between the two on that particular 80 is $2,010.00, and $2,010.00 over the whole divided by the 80 acres would give the exact diminution per acre; and the figures to be exact is $25.25 over the whole 80.

Q. That is $2,010.00 of the $2,350.00? A. Yes.

Q. How do you arrive at the other $340.00? A. The remaining loss in value to the land in my judgment was arrived at and is represented by the difference in value of the North 80, that tract from the road, in which the 65 acres of Cobb and the 15 acres of Dill contributed about $6,900.00 to the value as a whole before the taking, and after the acquisition of the clearance easement contributed about $6,560.00 to the value of the whole. At that time there were about 53 acres subject to the clearance easement that is 53 acres of Cobb and about 12 acres that was not, and there was some Dill that was subject to the clearance easement, bearing that in mind there would be a difference of $340.00, and divided by 80 acres the exact difference would be $4.25.

Q. Exactly then, the damage to the North 80 acres was $25.25 an acre, and the damage—I mean the damage to the South 80 acres was $25.25 an acre, and the damage to the North 80 acres was $4.25 an acre? A. That is my best judgment, sir.

Q. And these charts, now how did these charts help you fix the difference in value? A. The study of these sales, and I do believe the two that were the most persuasive on the charts, being the sales of the little strips down to the south of the Air Base, being sales No. 18 and 19, are the particular transactions that tend pretty well to demonstrate that the judgment estimate of the loss in value is sound. There appears in those two transactions about a $25.00 loss in value under a clearance easement that is as serious as that which effects this South 80, being
430 about 13 feet on the east side and 53 feet on the west side, and prohibiting or affecting *him* uses other than agricultural.

Q. When all is said and done you arrived at the $2,350.00 by going back to Sales 18 and 19, and proceeding from that basis, is that correct? A. That is not quite correct, because the appraisal was made in 1956 and the sales were made in 1957, but I have checked the sales to learn whether or not the judgment that I arrived at in 1956 was in line with the market. And a period to be represented by the market, and on these two sales which were the only two sales I was able to find, it appears it was very much in line with what the buyers thought the loss in value was.

Q. You arrived at the value and then substantiated that value by reference of these two sales? A. No, I arrived at the market before and the market after in 1956, when the appraisal was made. As soon as these two sales were available, and they did become available in 1957, I checked them and had them in hand to check them at the south end of the base, and checked whether my judgment at the north end was sound. It does indicate that I was thinking in line with what the people did in the area.

Q. With reference to the Guthrie tract, 106E, the total difference in value before and after the taking here is $700.00 according to your testimony, is that correct? A. That is correct.

Q. Of that $700.00, $500.00 represents the difference in

the mineral value that you arrived at, is that correct? A. That is right.

Q. And did you take it the same way as Mr. Sidwell? A. Yes.

Q. And that is exactly the same figure? A. Yes.

431 Q. That leaves a balance of $200.00, and if I understand your theory right of Mr. Guthrie, if he was willing to sell and he encountered a buyer who was willing to buy, that that buyer probably in your opinion would chisel him down $200.00? In rough terms that is just what you testified to, is that correct? A. That is my judgment.

Q. That $200.00 doesn't have anything to do with any of these charts, maps or anything else? That is your best judgment? A. At the time the appraisal was made that was by best judgment, and these two sales which I just referred were made after the appraisal date, and judging from the way the buyer was able to cheapen the land down with the very low clearance easement upon it, it is my judgment that the $200.00 estimate of loss in value to Mr. Guthrie was due to that trading position and would be representative of the market, the way it would be.

Q. Your $200.00 value here is based on the Babb and Wood? A. The appraisals was made before the Babb and Wood.

Q. You feel that the Babb and Wood, which is in your opinion the most persuasive sales in this area, that they substantiate the $200.00 figure that you arrived at back in 1956? A. The Babb and Wood being the only two sales in the area subject to clearance easements, in my judgment they are persuasive that the $200.00 was sound.

Q. On the basis of your testimony, Mr. Guthrie had an oil and gas lease on his land, is that correct? A. It is my recollection of it, sir.

Q. According to Mr. Sidwell's map here it was to expire January 7, 1959. Do you agree with it? A. I have relied upon Mr. Sidwell's information there, and I trust it is correct.

Q. This map shows that there was a lease to Peppers Refining Company that expired on January 7, 1959. On March 8th, 1956 that lease would have a little more than two years to run, or almost three years to run, is that correct? A. That is correct.

432 Q. And under your testimony the Peppers Refining Company would be entitled to $500.00 by reason of the imposition of this 83.70 acre easement on Mr. Guthrie's land in which he owns all of the minerals, but Mr. Guthrie would only be entitled to $700.00, is that your testimony? A. I believe my testimony is that Mr. Guthrie would be entitled to $700.00. I don't believe I testified as to what Peppers would be entitled to, sir.

Q. Wouldn't that be a logical conclusion? A. It would appear to be a logical conclusion that each party should be treated alike.

Q. The sum of the two parts equals the whole, is that correct? The mineral interest according to you and Mr. Sidwell is $1,000.00 decrease, but Mr. Guthrie only is entitled to $500.00 because he has an oil and gas lease with a little more than two and a little less than three years to run? A. That is my testimony, and that is my understanding, sir.

Q. Mr. Kerkoff, the same thing is exactly true? A. As far as the minerals are concerned.

Mr. Camp: We move the admission of Government's Exhibit 33.

Mr. Whiteside: That exhibit will be admitted.

Reporter's Note: Government's Exhibit No. 33 is shown in the original copy of the Transcript only.

Reporter's Note: Now, the hour of 12:00 o'clock A.M. has arrived, and the hearing is recessed until 1:30 o'clock P.M., September 11, 1959.

At said time the parties appearing as heretofore, the following proceedings were had, to-wit:

W. D. DAVIS, recalled as a *witness*, having been heretofore duly sworn, testified as follows:

433 Further cross examination by Mr. Meacham:

Q. In regard to Tract 107E, the Kerkoff Tract, you computed that precisely the same way you did the Guthrie difference in value, is that correct, Mr. Davis? A. In so far as minerals are concerned, it was treated the same way as the Guthrie.

Q. There was in your judgment $1,000.00 mineral damage to the total mineral interest but you feel that in as much

as there was a lease that was scheduled to expire on January 7, 1959, a little less than three years more to go, that leasehold interest would be decreased its value in half, leaving a balance of $500.00 on the minerals? A. That is correct.

Q. And then that leaves $200.00 of the total of $700.00 that you set on this property; here again you attributed that your judgment as to how much a buyer would be able to chisel the seller on a sale of the property? A. How much a buyer would be able to reduce the price on account of the existence of the clearance easement.

Q. The clearance easement on the Kerkoff runs from 65 to 140 feet, extending on a part of the entire 200 acres owned by Mr. Kerkoff, and a total acreage of 80.10 acres. Is that correct? A. That is correct.

Q. And your $200.00, I appreciate you didn't figure it that way, but your $200.00 on the basis of the 80 acres would be roughly $2.50 an acre, is that correct? A. Dividing the acreage into the dollars would be about that, yes.

Q. Down at the south end of the base on the Smith tract, there Mr. Smith did not have a lease so you gave him a damage of $4,200.00 on his minerals, computing it the same way you did it on the other tracts, except here you use an aggregate total value of the minerals at $35.00 and you arrived at $4,200.00 as the difference in value by reason of the easement on the tract, the Smith tract, is that
434 correct? A. The loss in value attributed by the loss of minerals in the amount of $4,200.00.

Q. And that left $400.00. If I understand it, that $400.00 you felt like the buyer would be a little bit more successful in his resistance to the purchase price, and therefore made it twice as much as you did on the Kerkoff and the Guthrie tracts because this particular easement covered virtually the entire 140 acres. Am I stating your position correctly? A. The easement covered the entire 140 acres, and further the land involved is a little more valuable land, than the land to the north side of the base.

Q. A buyer according to your figures would be on the Smith place paying out $28,400.00, on the Guthrie tract he would be paying out $22,400.00, and on the Kerkoff tract $23,000.00, and by reason of the fact here he is spending $5,000.00 more of his money you think he would be success-

ful in being a little more reluctant to purchase, and would thereby be able to reduce his purchase price about twice as much? A. Not quite. I looked at by land per acre. In the Guthrie land we are dealing with $50.00 land, and the Smith land $120.00 land. In my judgment he would be able to receive a little more consideration, and that the seller would be willing to accept a little more discount on the higher price land even though there is no interference with the agricultural operation.

Q. On the Rogers 11.52 acres, you feel there would be buyer's resistance of $300.00, and you give even though that is 11.52 acres, that is $300.00 rather than $200.00, and it was on 83.70 acres in the Guthrie, and it was 80.10 acres in the Kerkoff. You gave him that because there is more money at stake, is that right? A. Because the land is a little more valuable land, there is a little more total money involved. Primarily the difference in the land value. In higher priced land it is my judgment that the seller would be willing to accept a little more discount in dollars even though the discount would probably be a little
435 less in the percentage as a whole, in order to go ahead and make a deal, and a buyer more successful under those circumstances.

Q. And no diminution whatsoever on the mineral interest on that entire tract? A. That is my judgment.

Q. On the Hoover, you allowed $1,200.00 of mineral damage computed on the basis of $35.00 an acre, and you think the buyer resistance would result in a reduction of that much? A. Fair cash market value of $400.00 on the tract, and I have so estimated it on the Hoover tract.

Q. Even though the acreage is half as large you feel that the land is more expensive, and therefore the seller and the buyer would arrive at a market value at twice as much in difference as there was in the Kerkoff and the Guthrie? A. Partly because of those reasons, and part the affected area is in the front yard, the nicest of the land he has, and as well located of the land he has. It is his choicest tract that is affected.

Q. On the Davis, A-118E, and on that particular easement it extends from 32 feet to 85 feet. You give him $900.00 difference in his minerals on the basis of $25.00 an acre, and $200.00 to the surface, is that correct? A. I believe that is correct.

Q. And that again, that $200.00 so the surface is your judgment as to how much a buyer would give, you think a buyer would have a talking point, I believe as you express yourself, that would cause the purchase price to be $200.00 less? A. Yes. He would have something to object to, and he would get some results, but after all we are dealing with a small tract in acreage, a small tract in total value and the seller in my judgment would be unwilling to go and won't go, or have to go beyond the figure indicated in order to satisfactorily make a deal. He doesn't have much lee-way to work in.

436 Q. On other easements on the Davis tract, which is a more restrictive easement, from 17 feet to 42 feet, you determined that would decrease the market value $1,100.00 on the surface alone, that was the only thing to be considered in this particular instance, inasmuch as the prior easement was on the property according to your testimony, is that correct? A. That is correct.

Q. That is a little less than one-fourth of the total value, is that correct? A. That would be about so, yes.

Q. And you arrived at that by determining that the difference in market value per acre would be $25.00 approximately, and on that basis you gave him $25.00 an acre on all of the land that he had left, approximately $25.00 an acre? A. That is approximately the way it worked out. I realize upon the two sales next to him—I relied upon the two sales next to him and the way the people apparently appeared to view those easements, and applied it to his particular situation.

Q. All of these values, as to your surface damage, the $2,350.00 on the Merz, the $200.00 on the Guthrie, the $400.00 on the Smith, $300.0 on the Rogers, the $400.00 on the Hoover, and $1,100.00 on the Davis, your testimony is that all of these you arrive at with reference to the Babb and the Wood land? A. That is not correct. In the Merz and the Kerkoff, and the Guthrie, the appraisals were made prior to the two sales to which you have referred, meaning the Walters purchase and the Johnson purchase. The remaining properties being the Davis and the Rogers and the Hoover and the Smith, were appraised after these sales occurred, and I had the advantage of those two transactions in estimating the loss in value on those three properties,

and I utilized that information in arriving at those conclusions.

Q. Yes, but initially you arrived at all of the values, as a matter of fact, all of the values as to all of the damage to the surface to all of the tracts except
437 the Merz and Davis, that is your educated surmise and conclusion, and opinion judgment as to how much a buyer would be able to succeed and still have a seller be willing to sell, and be successful in reducing the fair cash market value that amount? A. That is true, how much he would be able to reduce the price, and it is tempered by an average of buying and selling and apparently was actually done in the case at hand.

Q. And in that, which is the crux of the matter here, these charts are not at all persuasive? A. The summaries of the sales are not affected by the clearance easements, is not particularly helpful in the clearance easements. Two sales we are concerned with here are persuasive.

Q. Let's go back to Sale 18 and Sale 19, the Babb and Wood sale. I believe your number is Sale 18 for the Babb, is that correct? A. Sale 19 is the Babb to Walters sale.

Q. And No. 18 is Wood to Johnson? A. Yes.

Q. I think I followed you, but explain that briefly how you broke down that sale? First, when was that sale made? A. On the Babb to Walters transaction, the sale was made on the 16th day of March in 1957.

Q. It covered how many acres? A. The total acreage conveyed was 27.59 acres.

Q. How much was the purchase price? A. The total consideration was $3,000.00.

Q. That is approximately how much an acre precisely? A. $108.73 per acre.

Q. Now, in your analysis of that sale, did you determine what you think the fair market value of that property would have been at that time without any sort of an
438 easement on it? A. Yes. I have estimated about what it would be without any easement at all, and in a normal size.

Q. Alright, how much? A. Without any easement at all, and of a normal size which in this area is in the order of a quarter section, it is my judgment that the sale indicates that would have sold for about $190.00 to $195.00 an acre with all minerals.

Q. That is about $71.27 an acre more than it actually sold for with the easement on it, disregarding the factor of the size? A. That is correct.

Q. $81.00 difference? A. Yes.

Q. Which is not quite but almost 50 percent of the $190.00 value which you affixed to the land, is that correct? A. About half. The land with the minerals in my judgment would have *would have* commanded in the open market approximately that amount in decent size, without the easement.

Q. Just considering the factors we have mentioned, there is about a 50 percent decrease? A. Considering the factors involved there it would be a loss in value of total of about $86.27, of which would be made up of course of several things.

Q. We will get to that. I don't think the Commission misunderstands what you are saying. $86.27 an acre is approximately 50 percent? A. Yes. I believe it would be about a third of the whole to be exact, would it not.

Q. $86.27 of $190.00. A. Little less than half, 44 percent to be exact.

Q. Now, that is the basic difference in value, a difference between what it actually sold for and its value without any sort of an easement or diminution or size factor considered. Now, that $86.27, how much in your opinion was the value decreased by reason of the fact that it was a 27.59 acre tract rather than some other size tract? A. As well as I could analyze it from the nearby sales it appeared to be about a $40.00 reduction due to size and shape.

439

Q. There is a reduction in size, that is obvious, a reduction in price of $86.27. Now, in your judgment, putting yourself into the shoes of the buyer and seller do you think that $40.00 of that was due to the fact that it was 27.59 acres rather than a larger tract. As well as I can judge that is about the situation.

Q. That is purely a matter of judgment based on your experience, is that right? A. And study of the market in the area, yes.

Q. You have used no other sales in the area where there was 27.59 acres, where there was a 27.59 acre tract, have you? A. I have had no other sales of the same size for consideration in that immediate area.

Q. What do you think is a basic economic unit in this particular area, how many acres? A. As the transactions occur they appear more frequently in the quarter section class. There are sales of eighties (80's), but 160 seems to be the normal unit.

Q. You attribute almost a half of the difference in value on this particular tract to the fact that it was less than 160, and it is less than 80 acres? A. That is correct, and also because of its shape.

Q. What shape is it? A. It is 455 feet wide and a half-of-a-mile long.

Q. Why does that shape particularly hurt it? A. It is sort of the situation that a man finds himself in, he
440 can plant his crop only one way as a general rule and that is north and south. He doesn't have a choice of changing the direction of planting, or planting across a certain kind of soil or planting to protect against wind erosion. To get economic machine operation he is limited to one way planting, and that is not as desirable as it would be to have a choice.

Q. He could plant it more than one way, it would be more expensive if he ran the rows along the short way, or contour them? A. Yes.

Q. Is this land flat? A. It is pretty level.

Q. $40.00 of the difference of $86.27 is, in your opinion, merely to the fact that it is a small rectangular tract of 27.59 acres? A. Yes.

Q. That leaves a loss of value *od* $46.27, which is approximately 22 percent of the total value? A. In a general vicinity, yes.

Q. Is that all remaining loss attributable to the easement? A. Counting the loss in value in minerals as well as the loss of value in the property itself, yes.

Q. How much of that $5.00 an acre, I believe that is your testimony as to the residual value of the minerals, is that correct? A. That is correct.

Q. That would leave $41.27 diminution in value according to your testimony? A. That is not quite correct. Having a $5.00 residual value remaining, it would mean a loss in value of about $30.00 for the minerals, leaving about $16.27 over the whole as a result of the clearance ease-

ment's effect upon the land. That would be applied only to that area affected.

Q. There is $30.00 of the minerals? A. About $30.00 in that area.

441 Q. $30.00 of minerals, with just a residual value of $5.00 left, that makes $16.27. That is the figure you use on the Davis tract? A. That is approximately correct.

Q. On Sale No. 19, which is the Babb. When was that sale? A. The Babb to Walters Sale, was made on March 16, 1957.

Q. Is that the same date as the Woods sale? A. The Woods sale was made on February 8th.

Q. The sale we have gone through is the Woods sale? A. The sale we discussed was the Babb to Walters sale.

Q. This is the Woods? A. The date of the deed was February 8th, 1957.

Q. How many acres? A. It was 13.78 acres in the tract.

Q. How much? A. 13.78 acres.

Q. What was the purchase price? A. The purchase price was $1,500.00.

Q. Did you verify that purchase price? A. The purchase price in this tract was verified by the neighbor Mr. Walters. I did not meet either Mr. Johnson or Mr. Woods.

Q. My people back here say that the purchaser advises them that he paid $1,400.00. You don't know, do you? It wouldn't make a whole lot of difference in this calculation. A. The difference would be minor, and I relied upon Mr. Walters who was the purchaser of the other tract.

Q. Is this $190.00 land, disregarding size and disregarding any sort of an easement? A. I believe it

442 would work about the same way, yes. It is a rather nice piece of land, lies well against the road, and it would in my judgment sell about that price.

Q. Per acre price of the actual sale was how much? A. At the $1,500.00 figure, which I have been advised, would be $108.00.

Q. That leaves a difference of how much? A. From the $108.00 to $195.00, that would be $86.55 difference.

Q. And of that, again you used $40.00—you think $40.00 an acre, or a total of $520.00 some odd dollars diminution in value was due to the fact it was in a small tract? A. I have so considered it.

Q. That leaves $46.55, and here again you take $30.00 minerals, leaves you $16.55? A. For the actual loss over the whole due to the clearance easement.

Q. And that is based upon your valuation of $190.00 initially on the land, and your judgment that $40.00 of the per acre value was due to the fact that it was less in size and not square shaped? A. That is approximately correct. It is based on three sales, particularly the Schneberger purchase, as being the market in that area for that class of land, and I have tested the transaction by the Schneberger sale, and it seems to fit.

Q. And these figures, in your opinion, substantiate the $200.00 valuation that you have on the Guthrie and the Kerkoff? A. They indicate that the judgment estimate is sound and reasonable and in line with the market, yes.

Q. Do you think that by examining these sales which run from 13 feet on the east to 53 feet on the west, on a half of the area, that you can determine how much affect an easement of 53 feet on the east and 93 feet on the west would have on a sale? A. No, you can't determine it. Of course, you utilize all of the information available. I would have preferred much to have had some sales with tracts with easements just like those we are concerned. In the absence of such information I used all I could find and did the best with it I could, and when these are damaged so little and the height limitation is so great, it is my judgment that when the height limitation is so much higher the effect is bound to be quite small.

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Q. This is Government's Exhibit 33, and this is the basis for your determination of the value of the Davis 60 acre tract on March 8, 1956, is that correct? A. That is the basic information upon which I relied.

Q. And at the time of the second taking you adjusted the value of the Davis tract by, I believe about $1100.00 increase in value between March 8, 1956 and March 4, 1957? A. I recognized the increase.

Q. Now on this chart here, the ultimate insofar as the surface is concerned is this line that you have marked surface, is that correct? A. That is correct.

Q. On that line, that is overall, that would be the Cobb, Dill or what have you soil, overall soil on the 160 acres in

the Schneberger tract, you value at $168.12? A. That is my judgment the purchaser paid about $168.12 for it.

Q. And this one, the McDonald tract, sale No. 11, in your judgment he paid $123.75? A. About that, yes.

Q. And on the Duree, that is 80 acres, there is 80 in between it and the Davis tract on the east, $141.25, is that correct? A. That is correct.

Q. On this you have got Schneberger $168.12, McDonald $123.75, Duree $141.25, you took into account the fact Mr. Davis bought this 60 in 1954 at $60.70, and you end up with $97.91 as of March 8, 1956? A. Well—

444 Q. Now, as of March 4, 1957 this figure would be approximately $16.00 higher, is that correct? A. Yes, $112.00 or $113.00 an acre.

Q. So your whole testimony as to the value of the 15.49 acres on the Davis tract is based on the theory that it is two-thirds as good overall as the Schneberger, and that it is by far the sorriest piece of property as compared with Schneberger, McDonald, both of which are across the road to the west; Duree, just the 40 as you say between it, and the Davis tract. Your whole testimony is based upon that theory? A. I wouldn't say theory.

Q. Upon that conclusion? A. It is my judgment that the Davis soil is much less fertile and much less desirable than on the other three sales to which I refer, and I have reflected that difference in estimating its market value.

Q. In other words when it is all said and done, the ultimate moment of truth is that in your opinion Schneberger, it is just two-thirds as good as Schneberger and it is considerably less valuable than the McDonald or the Duree tracts? A. That is correct, it is less valuable than any one of the three.

Q. And if that conclusion is not correct then your conclusion as to the value is not correct? A. If I have not properly judged the relationship of this land just across the road from it to the west, and just a quarter of a mile to the east, of course my conclusions would be incorrect. It would be a matter of judging relationship as the buyer would in the market.

Q. If I understand this soil map that you have been using, and which is one of the strong factors in your determination of value—is that Government's Exhibit 16, is

that the soil map? A. Government's Exhibit 16 is the soil map of Washita County and I have utilized that in estimating the relationship between the various properties.

445 Q. When was that soil map made? A. I estimate the field work was done in the twenties, I believe the printing date is 1935.

Q. What scale map is that? A. A map of the scale of one inch per mile.

Q. One inch per mile, and how many inches in a mile? A. 63,360 inches in a mile.

Q. O.K., this scale then is about 1 to 63,000 and something, that is roughly the scale of this map? A. That is correct.

Q. Do you think the people that prepared this map went down each section line in Washita County in this area and actually checked the soil, or did they take points that were fairly far apart and then tie them in like they do on coastal geodetic maps, showing the subsurface? A. I don't recall just how they did it in 1920 or 1925 when that probably was done. The usual procedure was, of course, to take it as the U.S.G.S Maps, and you go down the roads and fill in the soil by the appearance of the surface and the profile.

They traveled pretty slow in those days, and they did take some borings, and frankly did in some respects a better job than we get today using aerials, and again going down the roads. Pretty general they are fairly *accurage*, not as accurate as taking foot and hand.

Q. They aren't accurate of boundaries within a limit of a few feet? A. No, they are not that accurate. They are a good indication, and a man looking at the land even though the map says a certain type in the field, a man might judge it to be a little different, and in his own mind classify it that way. In that case I generally stayed in the type but recognized the difference.

Q. You used the soil map and tasted and felt? A. I did put my big flat feet on it.

446 Q. And then you used the profile. What is profile? A. Where you can find a ditch and cut, see how the ditch is laid in, the subsurface and so on.

Q. Did you do some borings? A. Soil augers on it frequently, we had one along this time, and you are able to find cuts and breaks to give you a good idea.

Q. The *dephth* of the soil has something to do with its value? A. Quite a lot to do with the *dephth* of the surface soil.

Q. The *dephth* within various classifications? A. Yes, and what is under it is important.

Q. This—in recent years the Soil Conservation Service in this area has quit using what I call 'classical terminology' with regard to soil? A. They have prepared soil terminology classifications. It has a failing in that the difference between a Class I at the top and Class 2 at the bottom end of the scale is quite broad.

Q. Currently the Soil Technicians that work in this area do use a different classification, they have departed from this old what *what* I call classical, or Dill or of what it has to do with rock out of which this soil came, from which they originated? A. Originally they are named by the person or the area in which the soil is first found. We know the Dill as sandstone.

Q. Did you have any Clinton Red? A. I haven't found any.

Q. But currently people who deal in this area with soils use this Class I or 2, or that classification? A. Your soils people do. I think frankly from the standpoint of valuation these old soil maps are better.

Q. We are talking about a willing buyer and a willing seller, aren't we? A. Yes.

447 Q. Who ordinarily buy land? A. I believe with one exception in the sales that we checked of every buyer we checked was a farmer, and tended to operate or at *lease* closely allied with the operation of his land.

Q. That is true of the Babb and Wood Sale? A. Yes.

Q. Wasn't it a farmer in that area that bought them? A. Yes.

Q. But your purchaser ordinarily down there is a farmer? A. Either farmers or closely allied or associated with it.

Q. You realize, of course, that the willing buyer and the willing seller in Washita County are not people who would be familiar with the technicalities you use in analyzing sales? A. That is true.

Q. You use the basis of these sales, which I say guess, you guys approve of that to make an opinion to form an

opinion as to what these two gentlemen would do when they got together, and they have never got together, you have to guess on that basis? A. I would say this way, we do two things always. We know what the man paid for his property; second, we know what he got when he bought it. In looking at a number of those and separating them out in analyzing them we find they will make a pattern, farmers are the smartest people in the world and they watch those things when they are dealing with land, and you simply try to find what you are doing and then follow it.

Q. Do you think a farmer when he goes to buy a piece of land and he discovers in the abstract that the United States Government has imposed an easement, regardless of height, and that it is necessary to get a Federal Court Transcript in order to find out just what that is, and when he finds out it is in terms of Transitional Surface and Glide Angle Zones, and so many feet and degrees, do you think that will disturb him in the purchase
448 of that property? A. It is my judgment within a few years it will not, however, when he takes his abstract to his attorney for his advice, that this thing exists upon it, I am satisfied there will be a serious discussion ensue.

Q. You don't think it would have any diminution of the market value at all, except kind of a point you are talking about, chisel the price a little? A. I believe that is the way it would work on these high clearances.

Q. As I understand it you get all of this soil information and look at all the photographs, and then you go out on the land and stand on the land, walk around the land, stop in the middle and get this computer gadget, and you then and there comput the value, is that right? A. That is not correct. I do not at any time determine the amount of the value of the land, I estimate it. I do carefully go over the land sales in the area; and the property, and with those in mind and as near to the time I can do as possible out there as near to the land as possible, I make my preliminary estimate. I believe that is the most accurate and effective way to work.

Q. When did you do that first in this instance? A. The first work done in this instance was in the period following the 10th of June, 1956.

Q. At that time on the land you arrived at some values before and after taking, is that correct? A. I did that.

Q. Are those values you arrived at *at* that time the same valuation that you have testified to here today? A. They are the identical values on the Merz, the Kerkoff and the Guthrie.

Q. On the north end you have not changed your value since that time? A. That is correct.

Q. At the south end you have changed your value? A. At the south end I appraised them a year later, and of course estimated the values as of that time.

449 Q. But the basic value as of March 8, 1956 that you placed in the summer of 1956 as to all the tracts involved in that taking which was all the tracts except the Davis fee and the Davis 142E, the value you put then is the value that you testified to here in these proceedings? A. The value that I estimated for the Merz, the Kerkoff and the Guthrie in 1956 is the value which I have testified here. The value I estimated for the Smith, the Hoover and the Rogers in the summer of 1957, as of 1956, are the values which I testified here.

Q. You didn't fix any values in 1956 on the south end? A. That is right.

Q. You didn't arrive at any evaluation? A. I was not employed to estimate the value of those properties, and that includes the Davis.

Q. In 1956 you placed the values on the north end, in 1957 you placed them on the south end? A. Yes.

Q. You never departed from that at all? A. That is correct.

Q. Those are the same values you testified to here today? A. They are.

Q. The Guthrie sale didn't happen until 1957, but you used that value to prove to yourself, to substantiate the value that you had already placed at that time at the north end? A. As I understood your testimony that was a very important factor of your appraisal. A. I used Guthrie sale to test the value estimates made in 1956 and found it was in line with my estimates.

Q. Not to substantiate, but to test? A. To test.

Q. If I understood you at the beginning you testified that down at the south end of these tracts, down in the south

end was some of the best land in Washita County,
450 Oklahoma, is that right? A. I believe my intention was to say it was some of the best land it had been my privilege to see in Washita County, yes.

Q. That included the Davis, and the Smith, and the Hoover, and the Rogers land, is that correct? A. That is not quite correct. Basically speaking the best land is to the southwest area of the base, in that area Rogers and Davis has less desirable land.

Q. On the Davis land you have the two little tracts up to just north of it, that you say are these two tracts here, $190.00 land, surface only; the tract here across the road from it is $168.25, this land down here McDonald is $123.75, this land over here Duree is $141.25, the Smith land just right south of it, how much was the surface on the Smith land? A. The Smith value estimate was $128.00.

Q. $128.00 as to the total land itself. The Rogers land here, you had the value at how much? A. I estimated it at about $142.00, and the Hoover land down here $146.00.

Q. You have $190.00, $160.00, $125.00, you have all of these values all the way around. The Woods land as a matter of fact is just across the road from the Davis, this little tract is just across the road from the Davis? A. A forty (40) north of Davis.

Q. You have all of those from $123.00 to $190.00, but poor Mr. Davis's land is worth $113.00 an acre, is that right? A. Coming back to cases of the little tract belong-to Mr. Walters, with the mineral taking out, it would be about $160.00 on that point, the Davis land about $100.00.

Q. How much is the government paying you to testify in this particular case? A. Paying me regular professional fee of $125.00 a day.

Q. Is that for every day that you appear in Court, is it $125.00 a day for every day you spend in your office and out on the land, it is $125.00 a day, is that correct? A. In review and trial work at $125.00 a day.

451 Q. Your preparation work, you don't do it by contract except at per diem basis? A. In connection in that, traveling itself all per diem basis.

Q. In preparation, it is all a lump sum? A. It is per diem.

Q. Is this appraisal? A. Appraisal was one transaction, it was on a fixed fee basis; on a preparation of trial and trial basis, that was per diem.

Q. How much was it? It was over $5,000.00? A. I don't think that would be true.

Q. Would you say for sure it wasn't for over $5,000.00? A. I think so.

Q. Would you say for sure it wasn't over $3,000.00? A. I don't recall.

Q. You wouldn't say for sure it wasn't $3,000.00? A. I would not say, because I don't have any records with me and I just don't recall.

Q. Well, you won't say it is less than $3,000.00, plus $125.00 a day for the review and attendance of trial? A. It would be less than $5,000.00. How much I do not recall, and that the time charges are estimated in the trial and preparation of the trial.

Q. Do they also pay your expenses? A. That particular charge includes the expenses.

Q. Now about this sand business. Your testimony is that the folks at the base, or out in that area can go most any direction just around the base and they can get the same type of sand that Mr. David had, it is just easy to come by out there, is that your testimony? A. From my inquiry of it, I am of the opinion that there is a substantial quantity of the material that Mr. Davis had available, the same type was available in the vicinity, and as the
452 users have reported to me they get it as close as possible to the job where they use it.

Q. Then as a matter of fact if they have bought a considerable amount of similar sand from a man named Rainbolt, some 15 or 16 miles from the base, at 10¢ a cubic yard, you would assume that was the closest place that they could find the sand? A. I am talking from memory, but I believe Mr. Rainbolt has a pit and is a man that does have a sandpit that is acceptable; it is a different material as I understand from thematerial here on this property.

Q. Do you actually know anything at all about the sand except what your inquiry has been out there at the base, and you personally would not want to say anything definite about that sand except that you made an inquiry and the information you got from that inquiry, is that correct? A.

I would want to report to this Commission what I learned from those who are buyers of that material, and in relation to its contribution to the value of the property, and that is what they told me.

Q. That is all.

Examination by Mr. Whiteside:

Q. Mr. Davis, this sand under this code on the soil map, and if it was sold to the people on the base, what category would it fall? A. As I understood it, it would be under the coarse end of the Dill group, as I understand the category.

Q. This loamy fine sand? A. I believe that is the way it will show on the Davis tract; as I understand it is that little group in through that.

Q. That is all.

Examination by Mr. Tisdal:

Q. Is that top surface or under the surface? A. From the pit on the property that is now open, that is
453 a little organic material in the top surface and the material is a little coarser down underneath, and it is my understanding the material they are concerned. They strip the top and use the lower part for fill grading.

Q. That is all.

Examination by Mr. Meacham:

Q. That was the pit on the Davis farm? A. From my information on the existing pit on the Davis farm.

Q. That is all.

Examination by Mr. Whiteside:

Q. Have you ever been out to the Rainbolt pit? A. I have not been to that pit, sir.

Q. You don't know of your own personal knowledge just what type of sand Mr. Rainbolt has? A. I do not know from having made an examination of it.

Q. That is all.

Examination by Mr. Tisdal:

Q. Who did you consult about this? A. Three inquiries made, one is to the Highway Engineer in Clinton, I believe I can figure his name out, I have forgotten what his name

was, in the office right here in town, and I talked with Mr. Griner who is the local superintendent of Peter Kiewit & Sons, and his assistant Mr. Bob Matson. They were the men who had the original contract with Mr. Davis, dated the 14th day of June 1956, and they also had the contract with Mr. Merz across the road from which they bought certain land from him and used it for fine fill, and they also have the arrangements with Mr. Buster Davis at the present time for acquiring similar material.

454 Q. You don't know whether it is the same material or not? A. Mr. Griner, who is the user of the current material, was not familiar with Mr. Robert E. Davis' material; there had been a new superintendent when they used it, and he went to the other Davis in preference to going to Mr. Robert E. Davis. I know not what his reason was.

Q. Did you ever testify as to the value of this pit, or was it of any value, or was there just something there and they got it there because it was just there, or was there plenty of it right around the base, or what? A. I considered the Dill area as being an undesirable or a low value agricultural area, and upon the advice of counsel I did not consider the fact that the present owner had been able to sell this material to the sole purchaser, being the base, sole purchaser of importance, it being the base. That I am advised and understand to be a *gratitious* circumstance, dependent upon the acquirer's need in that immediate vicinity and not proper to be considered in the estimation of the valuation of the property.

Q. You didn't inquire whether Mr. Rainbolt had a sale on his before the base came in, or whether this was opened up after the base came? A. I understood from the Highway Department, Mr. Rainbolt was their regular source for this type of material, other than what they got immediately to the west of Clinton, and that he had been a supplier for sometime. I do not know whether he supplied any material to the base or not.

Q. I still would like to know is this pit of any value, or was it any value to Mr. Davis from a standpoint of selling the same to the base? A. From the standpoint of the market value of the property, as properly estimated, in my opinion it did not contribute to the value of his property

over the agricultural value. He was in a fortunate position, those things are not proper to be considered.

Q. For what reason?

455 Mr. Camp: Perhaps I could be of some assistance.

Mr. Meacham: I am objecting to the way he is answering this question. It is a neat little legal point of which there are perhaps neat other legal points involved in this litigation, and I think it would be more orderly if we discussed them at the time being. We have no objection that George told him it wasn't an item, and we will argue them later.

Further cross examination by Mr. Meacham:

Q. Your inquiry that you made as to the purchases of sand, when did you do that? In 1956, 1957 or 1959? A. In both periods, being in 1956 and 1959. The original inquiry was brought about when we found the lease of record between Mr. Robert E. Davis and Peter Kiewit & Sons for the removal of certain materials. We made inquiry concerning it at that time, and made further inquiries.

Q. You heard Mr. Davis tsetify, you know there are two pits out there, and he testified the one that was not involved here in this 15 acres did not meet government specifications. Were these inquiries specifically with respect to the other pit? A. It was with respect to the east pit, or the pit which did meet specifications. The current inquiry was to the remaining pit.

Q. These observations you made, it would not meet specifications concerns the pit that is left and not the pit that was taken? A. The answer of the question it would not meet the specifications. It is my understanding that the pit that was taken with a proper mix in common with many other areas in the vicinity could be used in the fill work. That the material remaining was not possible to get a proper proportion that would be acceptable; and I have so contended as a hot mix, under the right circumstances, it was acceptable with other materials.

Q. That is all.

456 Examination by Mr. Gillespie:

Q. So we could pass on this question properly when we get to it, you heard Mr. Robert E. Davis's testimony about

his sand pit here two or three days ago when he testified? A. Yes.

Q. That he had sold several thousand dollars of sand from this pit. You heard that testimony? A. I heard the testimony as to his sales of which I think there was $147.00 that was sold to others other than the base, that is as I recall the testimony and as my notes disclose.

Q. You heard him testify about the probable value they estimated as to his reserves? A. Yes, sir.

Q. Now ordinarily, in appraising the value of a piece of property you don't enumerate it, such a thing as a gravel pit, but I imagine in your experience you have run across some things of this nature, have you not? A. I have.

Q. And you have covered that ordinarily in your gross valuation for the property as a whole? A. That is correct.

Q. Would you have, except for the advice of counel, included anything in this particular valuation for these reserves? A. I would not have, because it is my understanding of the area without this air base, the demand for materials of this nature would have been so small, and the competition to sell it so great, that the amount an owner could realize would be infinitesimal, as indicated by his sales to others other than the base. The 1955 sales, I think he reported $125.56, and 1956 was $95.57, or 1957 was $147.00 to others other than the base. In 1957 was a wonderful year with $3,700.00 worth of sales, but only $147.00 to other users, and that is what normally happens in my experience in this type of a situation in this type of an area.

457 Q. Were you able to ascertain whether or not this advantageous sale situation except for this taking would have continued for any appreciable time? A. I was unable with any certainty, being a government base, my personal feeling would be that as long as the base was operated the probabilities it would continue to be more work done, would lead one to believe that that demand might remain. That seems to be the history of it.

Q. That is all.

Examination by Mr. Whiteside:

Q. But you didn't take any of this into consideration to the report you made to us of your determination of the

value of the property? A. I did not consider the sales to the base in estimating the value of the property.

Q. That is all.

Redirect examination by Mr. Camp:

Q. When you call this a pit, was this ever a pit in the nature of a sand pit where they wash and grade and separate the sand from the dirt, or was it more of a dome or ridge which was hauled off? A. In both operations, the current one and the one before the acquisition of A-142, it was simply a digging and loading operation. I do not recall seeing other than portable equipment in it on the places. A regular sand pit is quite complicated, with washing, sorting, and loading affairs. In may opinion that was never in that category.

Q. Such equipment would entail quite an expense? A. Yes.

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458 **Stipulation**

It is stipulated and agreed that the owner of the minerals under the NE ¼ of Section 26, Township 10 North, of Range 19, would testify, that he is present here in Court and would testify, that this 160 acres was leased for oil and gas and mining purposes on September 25, 1957 for a bonus of $15.00 an acre, by the Atlantic Refining Company.

FRED HOUCK, of lawful age, called as a witness on behalf of the Government, after first being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. Camp:

Q. State your name, please? A. Fred Houck.

Q. Where do you live, sir? A. Tulsa, Oklahoma.

Q. What is your occupation? A. Appraiser, and real estate broker.

Q. What qualifications, what has been your experience and background in the real estate work, brokerage, or related type of business? A. Well, I was in the general real

estate brokerage business with some small amount of appraisal work connected with it in Tulsa, Oklahoma from 1929 to 1941. In 1941-1942 I spent a year working for the City of Tulsa in the acquisition of land for the Bomber Plant east of town, in 1942.

Q. In what capacity? A. Reviewing appraisals and closing the transactions in the acquisition of the land for the legal department of the City. In 1942 I was employed by the Corp of Engineers. My first work was closing, as they called it transactions, that means payment for the land which they acquired, and from that I went to Chief of the Acquisition Branch which has to do with the negotiations.

459 Q. What is the acquisition branch? A. It has to do with the negotiations in condemnations; and from there to Assistant Director of the Real Estate Division up until 1950.

Q. What were your duties? A. That was principally planning, or direction of planning projects, review of appraisals, supervision of appraisal and acquisition branches —under the Director, of course.

Q. What further experience do you have in the appraisal field? A. From 1950 to July 1, 1958 I was Chief of the Appraisal Branch, Corp of Engineers, Tulsa District. I retired July 1, 1958. Since that time I have been engaged in private appraisal practice and real estate brokerage, which I hold a real estate broker's license in the State of Oklahoma.

Q. As Chief of the Appraisal Branch, how many other appraisers did you have under you? A. Averaged about fifteen (15).

Q. What were your duties as Chief of the Appraisal Branch? A. Supervise the work and review appraisals, approve appraisals.

Q. Did that take you into the field? A. Yes, sir.

Q. Have you made appraisals for various departments of the government? A. Yes. I make appraisals for various departments. Do you want to know who?

Q. Yes. A. General Services Administration, Veterans Administration, F.H.A., Department of Interior, Department of the Army, Department of Justice.

Q. You have testified in Federal Courts as an appraiser? A. Yes; in Oklahoma, Kansas and Texas.

Q. Have you bought and sold real estate in Oklahoma?

A. Yes, sir.

460 Q. In connection with this particular lawsuit Mr. Houck, when did you first become acquainted with this area? A. In 1954, just before the base was reactivated. We were advised by the Air Force what land they would require and we made a study of the area, and planning report in order to enable an appropriation of money to take care or acquire the acquisition.

Q. In connection with your duties at that time what did you do after receiving that information? A. Well, we began in 1954. We made a gross appraisal of the land required, and based upon that a directive was issued by the Air Force covering the acquisitions of the original land that they required, upon which we proceeded to appraise the land in separate tracts and attempted to purchase it.

Q. Now then, in connection with the particular tracts involved in this lawsuit, what type of study did you make? A. We first make a study of the general area, gather all the information that we think pertinent to valuation of real estate, and we make a study of the immediate area or the neighborhood for the same purpose.

Q. You mean you did that in connection with this appraisal? A. I supervised it, and I was in the field and on it many times, and I approved it.

Q. Continue and tell me what you did in connection with obtaining information upon which to make an appraisal of the subject tracts? A. Well, we make a study of the area, of course its location, specifically Washita County, as topography, climate, population, transportation, highways and roads, utilities and services, trade centers, the enterprises, farming and related enterprises, the size of farm units, the nature of operation, water supply, principal crops, little history of settlement and progress from that point; and as to neighborhood *date*, or in connection with the immediate area. Again the topography, transportation facilities, highways, and county roads, shipping

461 points, topography, drainage, the proportion of cropland and pasture, wooded areas, principal crops, and general appearance of the locality, the trade centers,

utilities available, water supply, educational and religious facilities.

Q. Did you make any study of the soils of the area, or what they reported to be? A. Yes. We go, or we did go to the Agricultural Stabilization Committee at Cordell to get their land use classifications on tracts that are involved in acquisition, we go to the Soil Conservation Service, get their soil classifications of the tracts involved.

Q. Did you utilize those soil classifications? A. I utilized them as a tool in making the appraisal, but not as a classification to appraise by.

Q. Did you make inquiry of other real estate which had sold in the area, and inspect it, in any way investigate to see what the values were in the area involved? A. Yes, sir. We searched the records in this case at Cordell, tired to get all of the recent sales in the immediate vicinity and inspect them.

Q. What did you do by way of determining the values of the minerals in the area? A. Well, in that connection we examined leasing records, also the records for mineral deeds, of which there were practically none around, or in this township. The only ones that we found were apparently family transactions, and I discussed the mineral values with informed people both from the standpoint of the way farm buyers look at it, farm sellers, and also with the brokers who deal in mineral interests as to what their opinion is as to mineral value. The actual value of the minerals as compared with the way the farmer might look at it in buying a farm.

Q. Did you discuss with local people who would be informed the other values of real estate and minerals? A. Yes, sir; real estate brokers in Cordell, abstractors
462 in Cordell, real estate brokers in Clinton, mineral interest brokers in Cordell, and also in Tulsa.

Q. Did you also discuss the mineral values with Mr. Sidwell? A. I did.

Q. What other investigation did you make of the areas before we get to the specifics? A. Of the general area?

Q. Yes. A. In order to have a starting place here—

Q. Let me ask you this— A. I am not following you very close, I guess.

Q. Referring to the Sales Map which has previously been introduced as Government's Exhibit E. Did you check those 24 sales that are related on that map? A. I did. I checked them, examined all of them.

Q. How did you examine them, tell how extensively you did examine these sales? A. Well, we went on the land and to the improvements, but not inside them in some instances; but not always inside on some sales.

Q. Did you go over the land? A. Yes, sir.

Q. Did you talk to the buyers and sellers of this land? A. Well, I missed some of them; I talked to a great many of them.

Q. Did you make any effort to ascertain from other individuals what the considerations were when the land was bought and sold, when you didn't get to talk to the parties? A. Sometimes I talked to the agent who sold it, but in most instances by the buyer and seller.

Q. Did you check the soil of the land? A. To the extent to determine, or not determine or estimate it whether or not it was a high type of the kind of soil that it was
463 supposed to be, you might have Dill fine sandy loam where it grades out to another sand, or up to a steep phase of Dill loamy fine sand where it doesn't break off sharply.

Q. What did you utilize in making those determinations? A. The Soil Conservation Classifications as the basis for it, and then an inspection on the property itself.

Q. Did you use the aerial photographs in evidence here? A. Yes, I examined the aerial photos at the Agricultural Stabilization Board.

Q. Did you check the assessed values or the County Records? A. I checked the assessed values with the County Assessor, and tax rate, and decided that the assessed values in Washita County were not much of a guide to value.

Q. Did you check the soil map that was in evidence? A. I did; I used that as a base check against the acreages that I got from the Soil Conservation Service, I took their's. They have a little gadget they go around the field with of the aerial, and they get the acreage.

Q. Mr. Houck, would you refer to the type of easement which is the subject of this lawsuit in all but one of the tracts, and explain to the Commission your understanding

of that? You have read it? A. I have read it, and I understand it to be strictly a height limitation of structures and perennial growth.

Q. Now then, sir, referring to Tract 104E, the Merz tract. Before we go into that have you placed upon Defendant's Exhibit E certain calculations in ink? A. Yes, sir.

Q. First let's discuss that. What are those calculations and what do they purport to be? A. Those are the analysis of sales, they are not appraisals of the property. They are what in my opinion the buyer and the seller did in that transaction.

464 Q. Did you make an analysis of each of those as reflected on that map, and then is that your conclusion as to each as outlined there and written on the map by you? A. That is my best judgment from my investigation.

Q. As to the mineral factor, what was your judgment as to the value placed upon the minerals by the parties buying and selling real estate per acre? A. I used $25.00 per acre for minerals across the board in this area, and that is based upon investigation among real estate brokers first, who have sold land in this area and sell land in Washita County, both in Cordell and Clinton; and then upon the opinion of the brokers who deal in mineral interests, who told me that as a general rule in this area farm buyers would consider the mineral interests they acquired or sold, the seller sold at approximately $25.00 an acre, even though there might be some slight variations from one particular part of the area to the other, and it might be a little bit higher than $25.00 an acre, because farmers are not mineral conscious except when someone tries to buy their mineral interest as a separate entity.

Q. Did you on each of those 24, perhaps there is only 22 on the map, are those sales analyses of each sale and you come up with that figure on each one? Take a representative one and tell me whether that is true as to all of them or not? A. Well, take Sale No. 10, which was 240 acres Henry Walters purchased in 1955, Southwest Quarter and the East Half of the Southeast of Section 21-10-19. The price paid was $42,000.00. The improvements in my estimate contributed $25.00 per acre to the sale price, one-

half of the mineral interest was conveyed, which was $25.00 per acre would be $12.50 for the half interest, which would leave $137.50 attributable to the land, the surface.

Q. Have you placed that type of a break-down on each of those tracts? A. All except sale Nos. 23 and 24.

465 Q. And on each of those is it my understanding that you did go on the tracts and make an analysis of that after you had checked the facts as to the particular sale? A. A. That is right.

Q. Did you use the same appraisal method as Mr. W. D. Davis used in applying these sales and the information which you gained from your study of those sales to the various tracts in this lawsuit? A. I used all three appraisal approaches.

Q. What are those? A. Cost approach, the income or earnings approach, and the market date approach.

Q. Let's move to 104E, the Merz tract. We have marked for Government's Exhibit 34 a Summary Sheet. That has been prepared for you, at your direction? A. It was.

Q. And you are prepared to substantiate the figures in this? A. Yes, sir.

Offers in Evidence

Mr. Camp: We move the admission of Government's Exhibit No. 34 as a guide for the Commission.

Mr. Whiteside: It will be admitted in evidence.

* * * * *

Q. Would you tell the Commission what you did in arriving at the before market value of the Merz ownership, what you considered as pertinent, or most pertinent? A. Well, I inspected the property carefully, thoroughly, and I found it to be a poorly improved owner operated, general purpose farm land. It is located on a graded county road adjacent to the air base on the north, approximately two miles from Burns Flat, 7½ miles southeast of Foss is the nearest railroad-shipping point, as far as I know. The topography is level to undulating. The drainage is adequate except for approximately 10 acres in the south central portion of the property, which is a little low and

466 tends to pond during periods of heavy rainfall, however the runoff is rapid and is no serious damage to the land. From the United States Department of

Agriculte Soil Survey of Washita County, I found that the soil types were Cobb fine sandy loam, 135 acres; Dill loamy fine sand steep phase, 20 acres; and Dill loamy fine sand 5 acres. The records of the Agricultural Stabilization Committee at Cordell show the land classification; or land usage figures as follows: Crop land and farmstead 160 acres; which is all in cultivation, except the building site.

Q. Did you go upon the land and make an inspection? A. Yes, I made a thorough inspection. The improvements were located on the east 80, near the south line of the property. There was some fence but not adequate fencing on the property. The house was a one-an-a-half story small house; and the barn, chicken house, windmill, privy, 1,000 Butler metal grain storage, cave, water well with a little centrifugal pump, 40 gallon pressure tank, all the improvements were rather in poor condition except the well equipment.

Q. What particular properties that had sold did you consider as most comparable in helping you reach your before market value of the Merz property? A. Well, in particular Sale No. 9 which adjoins the Merz property on the east, the Spitz to Morrison made in 1954, and it is the Southeast Quarter of Section 3-10 North, 19 West.

Then on the opposite or west side of the Merz property, Sale No. 2, made in 1954, sold to Mr. King, it is the Southeast Quarter and the East Half of the Southwest Quarter, Section 4-10-19.

Q. Are those the sales you relied upon as most comparable? A. Yes, sir.

Q. Did you apply the information you received from investigation of those sales to the Merz land and reach an opinion as to the before market value of the Merz land? A. Yes, sir, I did.

Q. What was that value? A. The value of the land surface, improvements and minerals, unleased, $25,050.00.

467 Q. Did you also using your study of the area, and these other considerations, sales, reach an opinion as to the after value of this tract after 104E easement was imposed upon it? A. I did.

Q. What was the value? A. $17,450.00.

Q. How did you break that down after you reached the after value to determine what portion of it applied to the

different portions of the farm? A. The easement area was $134.70 acres, which come through the center of the farm, leaving a strip unincumbered on the east side and on the west side. The height restriction at the south boundary was 13 feet, at the center of the property about 50 feet, and the north line 71 feet, I am not sure I can remember all of these clearances and I don't have an appraisal in front of me, but it is 71 feet.

Q. For your help, this is a sheet that lists all of those. A. 70 feet. Therefor in the south 80 acres of the tract there would be a certain area of land where the height restriction would prohibit the construction of normal farm buildings, normal farm operations, and would require the removal or cutting down of the upper part of the house. If the house has to be moved, which it has been, necessarily the remaining improvements would not be quite as efficient as they were before in the original location. However, the owner did move the barn and large chicken house over to the southwest corner of the property where he moved his house. The water supply would have been of small value where it is, it would be necessary for him to drill a new well where he replaced his house. There would be a diminution of value of remaining improvements that were not removed. In my judgment there were approximately 40 acres in the South 80 of a better type of land, and about 27 acres of a lesser valuable type of land which were affected by the easement. There is 13 acres lying outside of the easement area that I do not think the value was affected on that.

468 Q. Did you then reach a conclusion on this Exhibit 34, the lessor value attributed to the land portion was the difference between $3,250.00 and *$1.250.00*? A. That is the improvements.

Q. And the before value of the land $17,000.00, and the value after taking $15,400.00? A. That is right.

Q. And as to the improvements the same method was used to arrive at the value stated there on the exhibit? A. That is right, reduction in value of $3,250.00 to $1,250.00.

Q. I believe by my calculations you valued the minerals at $30.00 per acre? A. That is right.

Q. How did you come to that conclusion when your study indicated that the buyers and sellers valued them at $25.00

per acre? A. Well, that was based upon information obtained from men who are informed in the value of mineral interests in the area, and from discussion of the mineral values with Mr. Sidwell.

Q. How did you attribute the lessening of mineral value to this particular farm? A. Well, I felt the clearance was too low to permit drilling within the easement area, and that the narrow strip left on the east and west sides were not sufficiently wide for development purposes.

Mr. Meacham: Is his testimony of the minerals exactly like Mr. Sidwell and Mr. Davis in all respects, is that right? If it was I thought it would be merely accumulative, it would be alright to put it in his exhibits. No use of spending any time on it.

Mr. Camp: Yes, they are all the way through.

Q. You follow the same values as Mr. Sidwell and Mr. Davis on all of the tracts? A. Yes.

469 Mr. Camp: If that is satisfactory with the Commission we won't take the necessary time to go into detail on each of those?

Mr. Whiteside: It will be very satisfactory.

Q. Mr. Houck; I haven't covered the north 80 yet. Continue and cover this tract? A. On the north 80 acres the height of limitation from 50 to 70 feet, in my judgment would not interfere with normal operation of the property for its highest and best use, which is agricultural purposes; nor would any prudent person construct any improvements up there on the north 80 higher than 50 feet. However, I think there is a slight diminution in value that is not an actual decrease in value of the land, but there may be some out of pocket incidental expense that someone will have to pay, either the seller or the buyer in abstracting. And for that reason I lessened the value of the north 80 acres $2.50 per acre, or a total of $200.00, which results in the damage of $2,000.00 to the improvements, $1,600.00 to the land, and $4,000.00 to the minerals, or total of $7,600.00.

Mr. Meacham: Did he explain where he got the other $1,400.00 or $1,600.00 of the surface?

The Witness: Off of the front 80.

Mr. Meacham: At $20.00 an acre?

The Witness: On the South 80 there would be 40 acres of the better land which would be reduced $25.00 an acre,

27 acres of lesser value property crop land reduced $15.00 an acre, and the North 80 at $2.50 an acre.

Examination by Mr. Gillespie:

Q. As I recall on this Merz tract, both of the landowners testified that they spend some $500.00 in drilling
470 a new well, and had some $200.00 in moving expense on their improvements, or some $700.00. Did you consider those factors in this before and after valuation on improvements? A. I did, and I discussed that with the Merz brothers after they had moved the house as to what it did cost them to do it.

Q. And drilling the well? A. Yes, and I think they testified to exactly what they told me.

Q. You took that into consideration? A. Yes.

Q. That is all.

Further direct examination by Mr. Camp:

Q. Is it my understanding that you were familiar with this particular land and all of these tracts from 1954 on, but this appraisal that you have made is more recent, based upon the information you had at that back date, is that correct? A. No. It is based on information and data that I accumulated since 1954 down to the date of the appraisal.

Q. Let me understand this, originally for the Corp of Engineers, a person by the name of Morris Fears made the original appraisal and you helped and supervised and approved his appraisal, is that correct, and then he died? A. Yes. I was on the properties several times.

Q. You worked with him on it because you had to approve his conclusions? A. That is right.

Q. And then since his death were you employed by the Department of Justice to make your appraisal again of this property? A. That is right.

Examination by Mr. Tisdal:

Q. How did you arrive at the value of these minerals?
A. I discussed mineral values in this area with
471 brokers who deal in it, and also with Mr. Sidwell who has been appraising in the area at least a couple of years.

Q. Did you find any place where there had been any minerals sold for $25.00 an acre? A. No, sir, not separated.

Q. Did you ask anyone if they would take $25.00 an acre for their minerals? A. Yes, I did.

Q. You could have bought some at $25.00 an acre? A. No, sir; you couldn't have bought minerals at $25.00 an acre if you separated them from the farm.

Q. Anytime you buy them you are going to separate them, aren't you? A. I didn't find any mineral deeds except family transactions. Thompson, I believe it was, conveyed half of his minerals to his two daughters, I think; I discussed that angle with real estate brokers and oil interest brokers, and they just don't sell minerals.

Q. In other words do you feel that $25.00 an acre is all the minerals were worth to any of that land out there? A. No, sir. That was the figure that I put in the analysis of the sales that I feel in my judgment is the way the farm buyer looked at it in that transaction.

Q. In other words that is how you arrived at it? A. Yes, not appraisal, an analysis of the sale.

Q. That is all.

Examination by Mr. Gillespie:

Q. You say you talked to mineral brokers and Mr. Sidwell. Who did you rely on? A. All of them, with a figure based on my judgment.

Examination by Mr. Tisdal:

Q. Who did you consult on that, what local real estate broker on the minerals like that? A. Up until re-
472 cently in Cordell Mr. Rainbolt on the—on both the surface and minerals.

Q. Which one? A. I don't know their names, the father and son. I know John is the older one, I don't know the son's first name.

Q. Mike? A. Yes, and the Johnson brothers south of the square who deal in mineral interests considerably, to a considerable degree, and others.

Examination by Mr. Whiteside:

Q. In the analysis of the sales did you confirm those analyses with any of the purchasers or buyers of those various tracts? A. I attempted to *to* do that, and I have done it in other areas. When I was with the Corp of Engi-

neers I had a good deal of mineralized areas, we always attempted to find out what the land buyer thought he paid for the mineral interest that he acquired, and we found a gerat variation everywhere. Ranging, for instance, in Pawnee County, as an example, where Keystone Reservoir is now being constructed, it ranged all the way from $5.00 an acre to $50.00 an acre.

Q. Did you not find that most purchasers of farms, or especially if they were farmers, that they themselves couldn't break down these sales like you have? A. That is true. If you are trying to make an investigation on it you have to do quite a little talking to get them to think and try to figure out what they did place on those minerals in the transaction. Now, the brokers who deal in farms usually have a fair idea of what the general average is for the vicinity, not value, but in the minds of a farmer in arriving at a figure in a given transaction, and that will vary accordingly as the buyer or seller are mineral conscious, that varies considerably.

Examination by Mr. Tisdal:

473 Q. You broke that down on these sales here. Is that buyer and seller figuring on that, is that their estimate? A. No, that is my estimate based on information that I gathered.

Examination by Mr. Whiteside:

Q. These break-downs on here aren't what you think the value of the land and improvements and minerals are, but what the farmer probably valued them at? A. I think that is what he did in those transactions. If he were going to sell his minerals he probably wouldn't sell them for that at all, that is separate them from the surface, he probably wouldn't sell them at all.

Examination by Mr. Tisdal:

Q. You have a figure down here on Sale 4, in 1955. I see you have improvements here at $25.00 an acre, which would be $4,000. A. My information was when that sale was made there was a house on that property and it was removed.

Q. Did you investigate what he got for that house when he sold it off? A. No, I didn't; because if he sold it for

removal it wouldn't have too much indication of what it was worth on the farm; it would be salvage value then.

Q. Would that be a true picture of salvage at $25.00 an acre, or $4,000.00 if he turned right around and sold it off? A. That would be that one particular man who didn't want it there, another buyer might want the house and it would stay there. I am not attempting to judge it with one particular man. The man who bought that property, it would depend on whether he would want to keep the house or not, that is a matter of his idea as to how he wanted to operate the place.

Further direct examination by Mr. Camp:

Q. How do you define the market value which you are testifying about? A. Market value is the highest
474 price expressed in terms of money that a property will bring if exposed on the open market at a reasonable time, with both buyers and seller having full knowledge of all the uses for which the property is capable of being used.

Q. In other words with neither the buyer or seller being forced to buy or sell? A. That is right, with no compulsion on either side.

Q. Let's proceed to the next tract, being 106E.

Mr. Camp: We submit Government's Exhibit 35 in evidence.

Mr. Meacham: This one, this is exactly the same thing Mr. Davis had, and if his method of arriving at it was exactly as Mr. Davis arrived at it, it seems to me it would be cumulative. If that isn't true, I think he ought to explain how he arrived at it.

Examination by Mr. Whiteside:

Q. Did you hear Mr. Davis' testimony concerning this tract? A. Yes, sir.

Q. Were the methods used in your arrival at the damage of $700.00, and the various valuations you have set on the property both before and after, the same as sued by Mr. Davis?

Mr. Whiteside: Could the parties agree that this exhibit, that Mr. Houck's testimony would be in accordance with this exhibit, and his method of arriving at it is the same as Mr. Davis.

Mr. Meacham: That is alright with the landowner.

Mr. Camp. I did want to point out the higher before market value that was included by Mr. Houck's appraisal after this tract, and that he did have different values on different things.

Mr. Whiteside: Why don't we try to restrict ourselves to the differences between Mr. Houck's appraisal and Mr. Davis's. I think it being agreed by *everybody* that Mr. Houck has used the same methods and et cetera in arriving at these methods. Is that satisfactory?

Mr. Camp: We would like to explain a little bit on this tract, in his appraisal at the value he placed upon the land value. The value he placed upon the mineral interest would be the same, and the improvements, but I would like to have Mr. Houck tell us how he, or what matters he considered to be pertinent as to those methods.

Mr. Whiteside: As long as they are different from the ones Mr. Davis considered.

Mr. Camp: We appreciate this is corroborative, but there is also over $100,000.00 between the landowners' theory and ours, and we want to make all available information that we have available to this Commission because this amounts to a lot of dollars.

Mr. Whiteside: That exhibit is admitted into evidence.

Mr. Whiteside: Proceed.

Examination by Mr. Camp:

Q. Mr. Houck, would you consider those limited aspects, the value of the land, the improvements, and how you reached the values there on 106E? A. Before and after value?

Q. Yes. I note you come up with a total value of $22,400.00 before the taking, and how did you arrive at that figure which is exactly $200.00 more than Mr. Davis arrived at? A. On the surface, land exclusive of minerals, I have 105 acres of crop land, including the farmstead, at $75.00 an acre, $7,785.00; 55 acres pasture land, $40.00 an acre, $2200.00, or $10,075.00 which I rounded at $10,000.00. That would be an average value of $62.50 an acre.

Q. It is my understanding you divided that, this into crop land and pasture land, and that is how you reached

your value? A. Yes, in accordance with the Stabilization Committee's Land and Usage Figures.

Q. And bearing in mind the various sales you examined? A. Yes.

Q. And the improvements? A. Total value of $12,000.00.

Q. Did you use similar methods of checking your values on your improvements? A. Your reconstruction costs, and various theories as Mr. Davis testified as a test. I estimated the reconstruction costs new, the accrued depreciation, and then the value that the improvements contributed to the property.

Q. By subtraction we learn there was $200.00 that you attributed to this farm, as having a lesser value of that much, in addition to the diminution of value of the minerals. What did you consider, and how did you arrive at that $200.00 figure? A. On the easement clearance, which is 83.70 acres, the clearance at the south line is 71 feet and the north line 163 feet. In my judgment that would not affect the operation of the property for its highest and best use. There would be no actual decrease in the actual value of the land or the improvements. There would be some, as I said, on the north 80 of the Merz tract, out-of-pocket expense, possibly engineering and abstracting and mapping, which someone will pay, will have to pay eventually, which I estimated to be $200.00.

Mr. Camp: Any questions on 106E by any of the Commission at this time?

477 Mr. Whiteside: No.

Q. If not, we will move on to 107E. Now then, on 107E, did you make a similar study, keeping in mind the various factors which you have previously testified to in the other tract? A. I believe I did in every way.

Q. And I note that you came out with a total amount of damages similar to that amount of Mr. Davis, in the sum of $700.00, but your before market value differs being $1,000.00 higher than Mr. Davis applied or placed upon the land. Could you tell the Commission how you arrived at that $24,000.00 before market value? A. Using the land use classifications, Soil Conservation Service which they use in every case, 40 acres of crop land including farmstead, $100.00 per acre; 90 acres of crop land, $75.00 per acre; 70 acres of pasture, $40.00 per acre, which

is $13,550.00, which I rounded at $13,500.00. In average value to the surface only, $67.50 per acre. The improvements were estimated at $7,500.00. In this case the lessor's interests only, the minerals, they were $3,000.00, making a total of $24,000.00.

Q. Did you hear Mr. Kerkoff when he testified that he thought the before market value of his property what you stated is $24,000.00, his was $25,000.00? A. Yes, sir, I heard him testify.

Q. And likewise on the Guthrie property, 106E, were you present and did you hear Mr. Guthrie testify that the before market value he placed on the property was $25,000.00, and which you placed a market value of $24,400.00? A. Yes, sir, I heard it.

Q. In connection with reaching the values on 104E, 106E and 107E, did you consider the sale or have you since considered the sale to the north, in which Mr. Guthrie bought the Southwest Quarter of Section 34 in the next township? A. I have considered that sale, and I think it tends to support the value I put on the property.

478 Mr. Camp: We move the admission of Government's Exhibit 36.

Mr. Whiteside: That exhibit will be admitted in evidence.

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Examination by Mr. Gillespie:

Q. Mr. Houck, the nature of this easement as limited to the Merz tract first, do you think that would interfere with the landowners ability to secure a loan on the property? A. No, sir. I have made some investigation not only here but other places in that respect, assuming that they have a good borrower—on the Merz tract they consider the limitation as it applies to the south 80, and possibly lower the amount of the loan.

Q. The fact it is at its lowest extremeties 13 feet, would lower the ability to buy? A. Yes. They would lower their loan accordingly, that is my opinion.

Q. That is all.

Examination by Mr. Tisdal:

Q. What campany did you investigate? A. Prudential.

Q. You went to the Prudential themselves and asked them? A. Yes; Equitable, and Federal Farm Bank.

Q. They all said they would make a loan on it? A. Yes, assuming that they wanted to make loans in that area, and that they had a satisfactory buyer, they would consider the loan. They didn't say they would make it, they said they would consider it, which means to me they would make it.

As a matter of fact there has been no effort anywhere that I know of on the part of the loan companies to give any serious consideration of a clearance easement unless it actually had some effect on the highest and best use of the property.

479 Examination by Mr. Gillespie:

Q. When you talked to Prudential and these other loan companies, did you ask them whether or not they would make a loan where the clearance easement was as low as 13 feet? A. At one point I asked that. We have had clearance easements at other bases just as low as that, we always try to find out not only from the companies themselves, but from their acts in the actual community, from their agents in the actual community who seldom can give you as definite answer as someone in the company itself, who has something to do with the loans.

Q. That is all.

Examination by Mr. Tisdal:

Q. You have talked to the district field man, not just the agent? A. Yes. I have been to their district offices of various loan companies. I know enough of them will make loans, to make it safe to say that loaning is not out of the picture.

Q. That is all.

Further direct examination by Mr. Camp:

Q. You stated something about other air bases, and other districts. What air bases have you included in the Tulsa Corp Area in which you would have had experience on these matters? A. Vance Air Base at Enid, Altus Air Base at Altus, Sheppard Air Base at Wichita Falls, Texas, Amarillo Air Force Base at Amarillo, Texas, Perrin Air Force Base at Sherman, Texas.

Q. Tinker Field and Ardmore? A. Yes, Ardmore Air Force Base, Tinker Feld, all of them that are in the district. I might leave out one.

Q. Where is the district? A. The district esssentially is all of Oklahoma, Texas Panhandle, Southern Kansas, Northern Texas.

480 Q. Several air bases in southern Kansas, aren't they? A. Our district didn't have the military in southern Kansas.

Q. Have you in your work had experience in acquiring of clearance easements in all of those, as it is connected with the appraisal and valuation in all of the air bases? A. Not all of them, they haven't acquired them at all of them.

Q. In what number have you had experience? A. At Vance Air Force at Enid, Sheppard Air Force at Wichita Falls, Perrin Air Force Base, Sherman, Texas.

Q. In connection with those various bases and this one, is that where you made your investigation as to the mortgage companies' attitude as affected by clearance easements? A. That is true.

Q. What has been your consensus of opinion that you have arrived at from that investigation? A. That the loaning would be continued, that the affect of the easement imposed provided it was low enough to have an effect on the highest and best use of the land would cause a reduction in the amount of the loan.

Examination by Mr. Tisdal:

Q. Do you know of anyone that has obtained a loan where there was an easement like this on land? Have you known of anyone that got a loan after they had the easement on it? A. I know Mr. Guthrie obtained a loan, but I never made an investigation of it.

Q. Have you known of anyone that obtained a loan from a loan company on the immediate land under there, without having additional land A. I never made that investigation. We never did see whether they were getting loans or not. We investigated among the loan companies, and never received an answer of that kind, that they
481 would have to have land outside the easement area. As a matter of fact they usually do have.

Q. Have you ever talked to the loan company about any restriction, or increase in the interest rate on anything like that? A. I don't think I inquired about their interest rate. It is going up pretty fast.

Q. That is all.

Further direct examination by Mr. Camp:

Q. Mr. Houck, directing your attention to Tract 119E, south of the base, and Exhibit 37, which is the Summary Sheet.

Mr. Camp: We move its admission.

Mr. Whiteside: That exhibit will be admitted in evidence.

* * * * *

Q. I note by way of expediting the matter that you have reached a before market value of the Smith tract 119E, of $25,400.00, where Mr. Davis has testified to a value of $28,400.00. Would you explain to the Commission how you reached your value? A. I have in the valuation of the land, that is the surface only, crop land and farmstead, 60 acres at $125.00 per acre; cropland 60 acres at $100.00 per acre; pond area in the approximate center of the property, approximately 10 acres at $75.00 per acre; shelter belt, 10 acres, $75.00 per acre, total $15,000.00 for land. Improvements, estimated value of improvements was $5,500.00; minerals $4,900.00, making a total of $25,400.00.

Q. Again you took into consideration, did you not, all of the sales as you did in all of these tracts, all the various information which we previously discussed? A. I did.

482 Q. And you used the same method that Mr. Sidwell and Mr. Davis used as to the minerals, did you not? A. That is correct.

Q. But I see you come out with a difference between the before and after value different than Mr. Davis did, what accounted for that, beside the fact I assume you made your own appraisal, is that correct? A. If I am correct Mr. Davis testified that the surface damage was $400.00. The clearance upon Mr. Smith's property is approximately 81 feet at the north line, and 145 feet at the south line. In my opion it would be no effect on the highest and best use of the property, and therefor the measure of damages would be out of pocket expense, which either the buyer or seller would have to pay in connection with engineering, mapping and abstracting.

Q. That figure you value at $200.00 on this tract? A. Yes.

Mr. Camp: Are there any questions on this tract by the Commission before we proceed to the next tract?

Mr. Whiteside: No.

Mr. Camp: We have the summary sheet marked Government's Exhibit 37, and we move its admission.

Mr. Whiteside: It will be admitted in evidence.

Q. This sir, is the Rogers Tract, 122E. You used the same methods and the same considerations in reaching your before market value as set out here of $28,300.00? A. That is correct.

Q. And I note that Mr. Davis on that tract concluded it was $29,600.00. There being a difference there. How did you reach your value? A. The land surface only,
483 crop land and farmstead, 120 at $150.00 per acre, crop land 40 acres at $100.00 per acre, total of $22,000.00. The average land value surface only $137.50, total of $22,000.00, for land surface only. The contribution value of the improvements $3,500.00, mineral value, lessor's interest only, $2,800.00, or a total of $28,300.00.

Q. I note the difference between the before and after value is $200.00. Is your explanation of that $200.00 figure the same as in the previous tracts? A. It is the same because irrespective of the fact that there is only 11.52 acres in the easement area, the out-of-pocket expense would be the same.

Mr. Camp: Does the Commission have any questions on 122E from Mr. Houck at this time?

Mr. Whitside: No.

Mr. Camp: We move the admission of Government's Exhibit 38.

Mr. Whiteside: That exhibit will be admitted.

Q. As to Tract 123E, what was your opinion as to whether or not the only interest that is before the Commission would be one-half of the lessor's mineral interest was affected? A. I don't have that tabulation.

Q. Do you recall it is a rectangular tract on the west, that goes over 295 feet as I recall. Was your consideration the same as Mr. Sidwell and Mr. Davis, there was no mineral reduction? A. No damage in my opinion.

Q. As to that estate? A. That is right.

Q. Then we go to 124E. I take it on 123E your reasons were the same as the other witnesses who have testified? A. They were.

Q. That is Mr. Davis and Mr. Sidwell's reasons? A. That is right, yes.

484 Mr. Camp: Summary Sheet No. 38, we move the admission of that.

Mr. Whiteside: That exhibit admitted in evidence.

Q. Again, as in all of these tracts you took into consideration all of these factors that you testified about in reaching your before market value? A. That is correct.

Q. And you reached the value, is that correct, of $29,600.00, where Mr. Davis' figure was $31,200.00, is that correct? A. I believe that is correct.

Q. How did you account for your value of $29,600.00? A. Valuation of land, surface, cropland and farmstead, 80 acres at $150.00 per acre; cropland 60 acres at $125.00 per acre; pasture 20 acres, at $100.00 per acre, total of $21,500.00 for land surface only. I estimated the contributing value of the improvements at $2,500.00, the contribution value of the mineral interests unleased $5,600.00, total of $29,600.00.

Q. I believe you again reached the same values as they affected the minerals as Mr. Davis and Mr. Sidwell? A. That is correct.

Q. But as to the total damages or the total difference, yours figures $1,400.00 where Mr. Davis' was $1,600.00. In this case did you apply the same $200.00 figure that you have in the previous tracts in which that figure was applied for the same reasons? A. That is correct. I see no difference between this tract and the others in that respect.

Mr. Camp: Are there any questions by the Commission on the tract 124E at this time?

Mr. Whiteside: No.

Mr. Camp: We move the admission of Government's Exhibit 40 at this time.

485 Mr. Whiteside: It will be admitted.

* * * * *

Q. Mr. Houck, referring to Tract 118E again. Let me ask you a question as to these particular tracts on the south of the base. You mentioned Sales 9 and 2 as being the two specific sales that you relied more heavily upon for

the three tracts on the north end of the base as to all of the tracts, or what portion of the tracts on the south end of the base did you rely, if you did rely more heavily on certain of the sales to the south of the base? A. On the left hand side lying south of the base, I relied more on Sale Nos. 10, 11 and 15.

Q. Did you also consider sale numbers 18 and 19? A. Yes, sir.

Q. Have you also considered the Sale No. 24 which would be the Northeast of 28? A. I considered them, yes.

Q. That is true to all of the tracts on the south end of the base, is that correct? A. That is correct.

Q. Referring to 118E. I note by Exhibit 40 that you reached a before taking value of $7,250.00, and Mr. Davis in his summary sheet I note reached a value of $8,050.00 before the taking. Would you explain to the Commission, how you reached your before value? A. The valuation of the land surface only before the taking, cropland 35 acres at $100.00 per acre, cropland 10 acres at $75.00 per acre, pasture 15 acres at $50.00 per acre, total of $5,000.00, or average value for the land surface only of $83.33. The contribution value of the improvements I estimate at $1,200.00, the minerals, lessor's interest only, $1,050.00, or total of $7,250.00.

Q. Did you give consideration to the fact that Mr. Davis had bought this particular property within 18 months prior to this lawsuit, for the sum of only $5,000.00? A. I gave consideration to that *face*, but I felt that Mr. Davis had made a very fortunate purchase. In other words he purchased it below its market value.

486 Q. How did you arrive at your after value for a total of $1,100.00 in this tract, was that all attributable? A. $900.00 of that was attributable to minerals.

Q. $900.00 was attributable to minerals in the same manner that was attributed to the minerals by Mr. Sidwell and Mr. Davis when they testified? A. That is correct; $200.00 attributable to the surface.

Q. And in the same manner as you previously outlined on other tracts? A. That is right.

Q. We have a Summary Sheet for Tract 142.

Mr. Camp: We move its admission in evidence. It has been marked as Government's Exhibit No. 41.

Mr. Whiteside: It will be admitted in evidence.

* * * * *

Q. Referring to A-142, I note by Exhibit 41 that you reached a before value of $7,350.00. Would you tell this Commission what you considered in reaching that value? A. I felt that during the period from March 1956 to March 1957 that there had been a considerable more demand for land in that area, there had been a recognizable increase in the value of the lands. Therefor, I estimated the value of the lands, surface only, crop lands 35 acres at $125.00 per acre, 10 acres at $100.00 per acre, pasture 10 acres at $50.00 per acre, and 5 acres where surface value had been partially or had been damaged at $25.00 per acre, or a total of $6,000.00 for the lands, surface only.

Q. This was subject to the clearance easement previously acquired? A. Yes. The value of the improvements estimated at $1,200.00, the minerals at $150.00, which was the residual value left after the acquisition of the clearance easement in Tract No. 118E, the total sum of $7,350.00.

487 Q. I see you reached an after value of $5,010.00, leaving a difference of $2,340.00. What did you consider in that regard? A. I considered the value of the part taken, 15.49 acres, $925.00, the improvements $1,075.00, which was all of the improvements except the fencing, the total value of $2,000.00. The valuation of the remainder of 44.51 acres after the taking, lands $4,775.00, improvements $125.00, which would be the value of the fencing, for a total of $4,900.00 on the remaining lands. Severance damage estimated at $300.00, made a total of $2,300.00. The minerals taken in 15.49 acres, the lessor's interest at $40.00 or a total of $2,340.00.

Q. Did you see this land in 1954? A. Yes, sir.

Q. There has been considerable conversation here and testimony about the utility of this land as to whether or not its highest and best use was agricultural or for material of which the land is composed. Would you explain to the Commission what you saw and what your inspection of it revealed to you, and what use was made of the land? A. When I first saw the land on the date of the appraisal

of taking of Tract 118E clearance easement, the tract consisted of approximately 39.9 acres of crop land, and 18.2 acres of pasture. At the time of the taking of Tract A-142, material for fill and runway construction was being removed from the north end of the property.

Q. Would you explain in what manner, or how was that being accomplished, what was the nature of the operation? A. It was a dump truck operation, the loading equipment was a small shovel, motor operated tractor deal.

Q. Was there any washing of sand or anything like that like you find in a sandpit? A. No, no equipment except tractor shovel.

Q. What was the material used for, if you know? A. For fill under the runway in connection with other materials.

488 Q. Did you consider that element ascertaining what you considered to be the highest and best use of this property? A. I did, and in order to gain some information about it, I contacted the Lt. Commander Corn, who was then Naval Officer in charge of construction on the base, and contacted the Superintendent of Peter *Kkiewit* & Sons Construction Company on the base to find out why they were using that material, what extent they thought they might use it, get all the information I could about it. I was informed by Commander Corn and the Superintendent that they had removed, or had moved about all they would use at that time. However, I think they did use more than they anticipated they would. I asked them why that particular material, and they said it was suitable for the purpose, and it was the closet location that they could find suitable material. So I considered it a base created demand for material that was rather common to the area, and that the only reason they had selected Mr. Davis' property was because of the *proximidity* of the closeness of the haul, which was just up a few hundred feet and into the base.

Q. And in your opinion what was the highest and best use of this land? A. Agricultural purposes, and limited because of the size of the property, it was not an operateable unit, 60 acres.

Q. Is that as to the whole property, or did any particular portion of it in your estimation have a higher

and better use because of its having to be where the material happened to be? A. No, I didn't consider that had any contributing value.

Q. Is this building that you valued at approximately $1,000.00 the same building that Mr. Davis—you heard him testify that he bought for $5.00? A. Yes, sir, the house.

Q. You have been in the house and examined it, have you? A. Yes, sir.

Examination by Mr. Gillespie:

489 Q. Mr. Houck, do you feel that any prospective purchaser might consider the fact that some $2,000.00 or $3,000,00 worth of sand had been sold out of this place previous to that time in determining what he would pay for the 60 acres? A. I don't believe so, because it was a one time market, and the amount that could be sold other than that which was sold to the base would be so small that he would not want to tear up the land to take in that small amount of money.

Q. You likewise, I presume, you don't feel that Mr. Davis or any other seller or owner of the land would consider that to be any value, and consequently therefor increase his price on the 60 acres because of that? A. I don't believe he would.

Q. Do you have any, or did you make an investigation about the possible further use of this material? A. I did, at that time.

Q. Could you give any specific information concerning it? A. As I said I discussed that part of it with Commander Corn, and Peter Kiewit & Sons' Superintendent, and to quote them or quote Peter Kiewit, when they were finished with the runway they were through. And recently I talked with the Highway Engineer at Clinton who said they had never used any, and also learned that similar material had been taken from Merz—purchased from the Merz land and Buster Davis land for similar use.

Q. Did you talk with anyone from the Nolen Brothers? A. No, I didn't talk to anyone from Nolen Brothers.

Q. As I understand your testimony though, you didn't penalize him in valuation for the sand that had been sold from that sandpit? A. Not for the sand that had been sold, but for the condition of the land, what was left of the

surface, the condition it was left in. It was very rough, there was no attempt to keep any degree of smoothness there, except they would go to the bottom to another type of soil, it was a kind of a rough-looking spot. However, there was five acres that I reduced to $25.00 an acre.

490 Examination by Mr. Whiteside:

Q. As I understand, the possible use of this material was so speculative you didn't consider it? A. Speculative, and other than that unprofitable after the market created by the base for the construction of that second runway was created.

Q. What do you mean unprofitable? A. That market would be gone, and then be a local market which had been demonstrated that $150.00 worth had been sold outside of that. I don't think that any prudent person would tear up their place for that amount of money a year for a speculative thing, and the next year it might not happen.

Q. What value is the 5 acres, at the time the sand was removed from it, say in March of 1956? A. $50.00 an acre.

Q. It wouldn't take much sand to make it profitable, would it? A. No.

Further direct examination by Mr. Camp:

Q. On that same matter, was that sand just scooped out and left the remainder to blow at the time 142 was imposed? A. There was sort of a ridge, Dill loamy fine sand steep phase ridges up there, sometimes a dome phase, and they went into that ridge that went across the north end of the property, and cut it off. That took them down, of course, below the surface.

Q. Did they do any deep plowing around there? I believe someone testified that he speculated anyhow that there had been some deep plowing out there, did you examine the land? A. I have never seen any evidence of any deep plowing on it.

Q. Have you examined that particular tract recently? A. In the latter part of 1958, early in 1959, and within the last week.

491 Q. You have been familiar with it since 1954 to date, is that correct? A. Up to last week-end of last week.

Q. During that period of time has there been any change in the farm land to your knowledge, by deep plowing, fertilizing, hauling in good soil and hauling off some bad soil, or any other thing of any nature? A. I observed no evidence of it.

Examination by Mr. Whiteside:

Q. On March 8, 1957 at the time of this fee taking, were there any growing crop on this 15 acres? A. No, not on the 15 acres.

Examination by Mr. Tisdal:

Q. What was growing on the south end of this? The strip run back in there, what was growing? Do you mean to say that was up in weeds at the south end of this? A. It was on the north end, not the south end.

Q. On the south end of this 15 acre field they are taking? A. The fee taking?

Q. Yes. A. The fee taking is on the north end.

Q. The fee taking of the south end? A. Not much crop, the removal of material didn't get into that.

Q. What I am talking about was, you said there wasn't much of that 15 acres in cultivation. Is that what I understood you to say or was I wrong? A. I think that 15 acres was practically all in pasture; it was all this Dill loamy fine sand.

Q. Aren't there a strip that runs back up there? A. A strip runs up along the west side, that wasn't taken.

492 Q. I know. From the south edge of this 15 acres is there a strip of this other land running back up in there and curves back in there? A. Sort of a little draw that came back up in there.

Q. They didn't have that in cultivation, it was in weeds? A. Yes.

Q. All up in weeds? A. As far as I remember it was. That has been destroyed, Peter Kiewit was waiting to get on there with his heavy equipment.

Q. I thought only 5 acres on the north side that was

affected? A. There was a lot more of that there, sir; but they only worked on approximately 5 acres of it.

Q. That is all.

Further direct examination by Mr. Camp:

Q. Could you on the aerial photo point out what you are talking about there? A. Here is where the cropland is. The cropland ended right here. 39.9 acres of cropland in the south central portion of the property, 3.9 acres over here. The Dill loamy fine sand steep phase is right along there. The fee taking was down just to the edge of that cropland, and right down there.

Examination by Mr. Tisdal:

Q. This is cropland? A. This is the end of the cropland there.

Mr. Camp: We move the admission of Government's Exhibit 42.

Mr. Whiteside: That exhibit will be admitted in evidence.

* * * * *

493 Further direct examination by Mr. Camp:

Q. Mr. Houck, directing your consideration to Tract 142E. I am looking at exhibit No. 42, and note there on that you find the before market value of that tract to be $5,010.00, and Mr. Davis concluded that value was $5,410.00. Would you explain to the Commission, first if that is your value, and then how you reached it? A. The $5,010.00 is the after value resulting from the taking of the 15.49 acres in fee, and the clearance easement was imposed at the same time.

Q. How did you value that then, you valued it in the same manner that you previously testified on 142? A. That is right, that is the after value from tract 142, no change.

Q. Then how did you reach your after value on 142E, of $4,210.00, or a difference of value affected by 142E of $800.00? A. Well, I felt that considering that the easement was taken in 118E had a clearance of 32 feet at the north end of the ownership, and 85 feet or 81 feet approximately at the south boundary, and that this easement taken in tract A-142E, a clearance of 17 feet at the north boundary and 42 feet at the south boundary, while these limitations

would not necessarily cause a change in lands use, it is my judgment that it would operate to limit the scope of the market. That a prospective purchaser would probably gain some concession in price. That the estimated market value of the property after the imposition of the easement would be, with the cropland, 35 acres at $100.00 per acre, cropland 4 acres at $75.00 per acre, pasture at 5.51 acres at $50.00 an acre, a total of *$4,075.00*. The improvements still consisted of the fencing only, $125.00, or a total of $4,200.00. $4,210.00 which subtracted from $5,010.00 gives you a damage of $800.00.

Q. Mr. Houck, you say you have studied the language of the clearance easements? A. Yes.

494 Q. What is your understanding of the use of the word 'material' as it is used in the clearance easements? A. My understanding of the use of the word material, and effect of that, means earth, of course, which means anybody—I mean anything that might be piled up, such as lumber, tires, or anything of that nature.

Q. Would it under your understanding of the use of the word and from your experience of the development of the clearance easements, would it include the use of machinery? A. I am sure it would not, in my judgment.

Q. That is all.

Cross examination by Mr. Meacham:

Q. Mr. Houck, now on this one you just finished, 142E, how was that again that you arrive at $800.00? In terms of per acre damage, is this $800.00 just a tip just because $200.00 of the $800.00 because that a buyer might have to hire an engineer and that sort of thing? A. I think in this particular tract that the clearance is low enough that while it wouldn't materially effect the operations of the tract, that prospective purchasers would have an effective tool to use in gaining a concession to bargain in the deal.

Q. That amounts to $800.00. You didn't break it down to so much an acre? Is there so much damage an acre? A. No, sir, it is not brought down that way.

Q. Mr. Houck, on March 8, 1956 when this lawsuit was brought, you were the official of the Army Engineers who were acquiring property? A. I was Chief of the Appraisal Branch.

Q. And you were directly concerned with the acquisition of this particular property in this particular lawsuit? A. Yes.

495 Q. You started making appraisements in 1954, along with Mr. Fears, you actually approved the appraisal he made at that time, is that correct? A. I reviewed them in the field, was over the properties with them, and we made a pretty careful inspection.

Q. And you approved his appraisal? A. Yes, sir.

Q. That appraisal was somewhat different than the appraisal you have today in regard to the Guthrie and Kerkoff tracts, considerably different, isn't that correct? A. I don't recall what the other appraisal was.

Q. You don't remember anything about that other appraisal? You remember you were out there in 1954 and you went into a man's house, and along the side of his property and talked to him, but you don't remember what conclusions you reached back there at all, is that right? A. No, sir; too many tracts back that far. I wouldn't be able to remember specific ones.

Q. To kind of refresh your memory at that time— A. I knew about the appraisals, but we make hundreds and maybe thousands, and I can't remember specific ones.

Q. You can still remember going out there on the ground? A. Yes.

Q. You keep some sort of notes on the thing, and that sort of thing? A. I did when I was with the Corp, but I don't have them now.

Q. At that time do you remember whether you and Mr. Fears went out there at that time, and you thought Mr. Guthrie and Mr. Kerkoff would have a substantial amount of mineral damage, is that right? Do you remember that? A. Well, I don't believe I ever made any statement of that kind.

Q. This appraisement that you and Mr. Fears made, prior to the Declaration of Taking in this lawsuit, at
496 that time didn't you make an appraisement in which there was an appreciable mineral damage to both the Kerkoff and Guthrie properties? A. It was more, but the amount more I wouldn't know.

Q. It was considerably more? A. Yes, but on mineral appraisals we had a mineral appraiser, let me state it this

way, and my approval was based on the support in his report.

Q. But you did approve the appraisal? A. Yes.

Q. And at that time the appraisement made at or near March 8, 1956 by the Department of Army Engineers gave a substantial damage to both the Kerkoff and Guthrie properties? A. I think it was more than the testimony today, but the amount more I just couldn't remember.

Q. The testimony today is that there is none on those particular tracts except to the north 40 of about $500.00? A. The south 40?

Q. About $500.00? A. Yes.

Q. At that time also you had a little bit different method of determining what the lessor's and lessee's interest was. At that time you didn't say that, you didn't feel that when you leased a piece of property that you immediately decreased the value of the minerals 50 percent, it wasn't the policy of your appraisers at that time to take that position? A. I don't remember what the position was.

Q. You don't remember what the policy was about minerals as to the lessor's and lessee's interest, you don't remember, that then it was about a fourth, or considerably less than a half? A. The division of the money between the lessor's interest and the lessee's interest would be strictly a matter of the mineral appraisers' decision, and I would have no control over him whatever.

497 Q. That is right, but you did see and can remember, you had the official position of approving appraisals out there and you were mildly interested in all details of the appraisal? A. Yes, I don't remember what the division was.

Q. You remember the division was less than today, less than a half? A. I don't even remember that, I have seen thousands since that time.

Q. You were Chief of the Appraisals Division in 1956 but you don't know, have any idea how this was divided? A. Not on any specific tract.

Q. As to policy as division of the lessor's and lessee's interest? Today you say it must be 50-50, as soon as I sell my *my* minerals, or put an oil and gas lease on my land I have decreased the value of my minerals 50 percent. It doesn't matter if you take the valuation 9 years and 11

months or one month before the expiration of the lease, that is what you testified today? A. Yes.

Q. Do you know whether that was the same policy you *gentlement* had when you filed this lawsuit on March 8th, 1956? A. It was not the matter of policy, it was an estimate that would be made by the mineral appraiser of the Corp of Engineers.

Q. O. K. Who is the gentleman back here, who has been back here all through the lawsuit? A. Mr. Lawrence Huss.

Q. Has he been here all during his trial? A. He came in about noon Tuesday.

Q. He has been here ever since? A. Yes, sir.

Q. He is a member or employee of the Corp of Engineers at Tulsa? A. Yes.

Q. You were an employee of the Corp of Engineers at Tulsa in July, until July 1, 1958 and since that time
498 you have retired on a pension, is that correct? A. You have the wrong word, a little pension.

Q. Are they paying you to come testify in this hearing here? A. Yes, sir.

Q. How much are you being paid? A. $100.00 a day.

Q. Does that include your hotel expense? A. Yes, sir, and travel.

Q. You pay your hotel and own travel, and you get $100.00 gross? A. Yes.

Q. And you get that for the days you have been here in Court, and you get that for the days you spend in preparation to come to Court, is that correct? A. Yes, in preparation to come to Court, but not for appraisal.

Q. In these sales that you have outlined here, I notice that in a number of them one farmer will sell a tract and he will reserve half of the minerals. Aren't there quite a few of them like that? A. That is pretty common practice in this area.

Q. You went to those two farmers and tried to find out from them, and you didn't get anywhere with it if I understand your testimony, as to how much value they placed on those minerals in that sort of a situation, and you didn't get anything from them, and so you analyzed the sale and that is the basis on which you say the minerals were worth $25.00, but you are using $30.00 on the north end and $35.00 on the south end? A. That is not quite correct.

I said I did get information from them, but there was considerable variation in what they thought the interest they acquired cost them in the transaction.

Q. They never had analyzed the sale quite like you gentlemen do; is that correct? A. I don't believe they ever do.

499 Q. I think that is right. You testified you knew about mortgaging property and that sort of stuff. In Washita County if you owned less than half of the minerals do you have a little trouble getting a loan? A. I don't know in Washita County, sir.

Q. Isn't it a policy, at least in Western Oklahoma with most of the loan companies, that you must have at least half of the minerals? A. I believe that is true.

Q. That is true with the Commissioners of the Land Office, Federal Land Bank, and all lending agencies? A. That is a general policy.

Q. If half is gone, no static, but when that other half is gone—getting one acre of that next half, it is going to have a considerable amount of value, is that correct, even in these sales where they are not dealing in minerals? You are testifying with reservation? A. What?

Q. If half is gone it doesn't hurt your mortgage value at all, but as soon as you sell into that remaining one-half you have hurt your mortgage value. You go along with me on that? A. I wouldn't know about that at all.

Q. You testified that the general policy was that you have to have half of the mineral rights. I am asking you if you already have half gone you can get a loan, and if you would sell five acres of minerals you couldn't get a loan? A. I couldn't answer that. I wouldn't know anything like that about the loan business, what policy they might establish, I don't know.

Q. You answered my question because you say they required half of the minerals, and if you didn't have half of the minerals therefore you couldn't get a loan. Is that true? A. No, sir, I don't think that is quite true.

500 Q. Now, you say it isn't the policy that the borrower must have half of the minerals, they snickered over here, and now you think that might not be right? A. Policies in all organizations can change most any time to

meet situations, and what policy changes might occur in a loan institution I couldn't even predict.

Q. You said a while ago the Commissioners of the Land Office required half of the minerals? A. I believe so.

Q. You testified a minute ago you talked to the loan agencies and now you don't know. The things that hurt in this lawsuit are just as true as the things that help, isn't that right? A. I didn't testify quite that way.

Q. You didn't? A. I said that I thought they would still make the loan based on the investigation that I made, but that they would refuse the loan if the easement affected the highest and best use of the property.

Q. How many acres in this Davis tract? A. 60.

Q. If we take 15 acres out of the northeast corner, your testimony is it won't come any further south than that line right there, is that correct? A. I think that is the approximate line, I am not sure of that.

Q. How many 15 acre tracts in a 60 acre tract? A. Four.

Q. Then this one come half way down the side here, if it is out of the northeast corner?

Mr. Camp: Here is the map, and I will show the Commission it is not coming out of one corner. It is this strip here.

Q. There is a strip here to here, don't you think that is about two-thirds of the way across that, about a
501 third over here, is this about half as long as this here, wouldn't you say that is fair? A. Just about, a little more than a third on the west side.

Q. Yes. Now, that would make it come down below that line that you pointed out here a minute ago, wouldn't it? A. I believe it would come down here.

Q. It would take in that cultivated land? A. Possibly it would.

Q. Is there—if I understand right, your testimony is that farmers don't pay any attention to minerals unless they sell minerals separate? A. No, sir.

Q. I tried to write it down. Here is what I have "Farmers are not mineral conscious unless separate entity". Did you say that? A. I said that.

Q. What does that mean? A. That means that they are intent on buying farms, not mineral interests, that is what I mean not mineral conscious.

Q. I see. In other words it doesn't make any difference to them whether three-fourth of the minerals are gone or not? A. Yes; ordinarily they try to buy at least half of the minerals.

Q. As soon as that last half goes, it retally hurts the value; is that right? A. You mean with no minerals at all?

Q. If half of the minerals are gone they don't get particularly excited about it, is that your testimony? A. That is right, I believe.

Q. If any more than half are gone then they get real excited about it, is that correct? A. I don't think they would get very excited.

502 Q. They go ahead and buy it? A. They go—they can go ahead and buy it, I don't know.

Q. But they would cut the purchase price then? A. They would think about it.

Q. You say the Guthrie tract, you determined that the value other than the minerals was $200.00 on the Guthrie tract, and one of the reasons for your testimony was that a mortgage was recently made covering that tract, is that your testimony? A. No, sir, that wasn't my reason for it.

Q. One of the reasons? A. No, it wasn't one of the reasons.

Q. It didn't have anything to do with your conclusions? A. I believe I testified that to the question if I knew of any mortgages had been made, did I know of any, and I said I know of one.

Q. It really didn't make any difference. The fact that mortgage was made, that didn't make any difference to you in the determination of damages at all? A. No.

Q. Did you have the benefit of seeing Mr. Davis's values before the values you testified today? A. No.

Q. Did he see yours before he testified? A. Not that I know of.

Q. You and Mr. Davis are appraisers, you are both working independently, and you come up with the same answers to these tracts. Is that unusual? Do appraisers always agree right down to the dollar, or within $100.00 of the value on 10 tracts of land?

Mr. Camp: I beg the Commission's pardon and counsel's. I don't think that is a fact in this evidence that they came out with the same conclusions.

503 Mr. Meacham: They did on three of them. On the Merz, and there you calculated you came out about $600.00 difference from Mr. Davis on a total of $7600.00, you and Mr. Davis varied by $600.00, he had $8,250.00.

The Witness: I believe that is right.

Q. The next one was the Guthrie tract, he had $700.00 and you had $700.00, is that correct? A. That is correct.

Q. On the Kerkoff tract, he has $700.00 and you have $700.00, is that correct? A. That is correct.

Q. On the Smith tract you have $4400.00 and I believe he had $4600.00, $200 difference, is that correct? A. I believe that is correct.

Q. On the Rogers tract you have $200.00 and he has $400.00, is that correct? A. I don't recall what his was.

Q. On the Hoover you have $1400.00 and he had $1600.00? A. I believe that is right.

Q. On the Davis, the first taking on the Davis you have $1100.00 and he has $1100.00, is that correct? A. Yes.

Q. And on the fee taking, you gentlemen computated that and you disagreed by $200.00 or $300.00. You have $2340.00 and he has $2740.00? A. I believe that is correct.

Q. The only difference between you and Mr. Davis on the Hoover and the Rogers and the Smith tracts, is simply this as I understand it, you attribute the $200.00 tip you gave Mr. Guthrie and Mr. Kerkoff because that is about what it would cost some buyer to go find out just what the easement amounts to. Mr. Davis testified that he gave them $200.00 because the buyer would have a certain amount of resistance, he expressed it a little bit different, is that right? A. Whatever amount he testified to that was his explanation, yes.

504 Q. And you took the $200.00 and you used it down at the south just like you did at the north? A. That is correct.

Q. Mr. Davis felt like down at the south there would be a little bit more buyer resistance and therefore there would be a little bit more damage. You used the $200.00 throughout, he varied that one little factor all the way through, is that right? A. I only used buyer resistance on one tract, that was 142E.

Q. On 142E as far as the land, the surface of the land is concerned, you think that when the government took

this 15.49 acres it damaged Mr. Davis $1,225.00, is that right? A. The taking?

Q. You have a total of $2300.00. Get your slip there on the Davis A-142. You gave $2,340.00 for that fee taking of 15.49 acres, is that correct? A. Yes.

Q. Of that amount $1,075.00 is because of the diminution of value of the improvements from $1200.00 to $125.00, is that correct? A. Yes.

Q. Then $40.00 is because of diminution in value of the minerals from $150.00 to $110.00? A. That is correct.

Q. That is $1,115.00 and subtracting that from $2,340.00 is $1225.00. You gave him $1,225.00 for the 15.49 acres? A. That is right.

Q. And there are two takings involved here, and you were with the Engineers and present at both times. Why was it necessary to have the second taking? Was the runway extended? A. The runway was extended, yes; that was the reason.

Q. There was a change in the plan of the project between March 8, 1956, after that time the plan was
505 changed, is that correct? A. Well, the plan was changed. I don't know exactly when, but they changed the mission of the base and required a longer runway.

Q. You filed this proceeding March 8, 1956 and at that time you didn't know that you were going to run the runway or apron way down on the Davis tract? A. I am sure I did not know it.

* * * * *

Government Rests

Mr. Camp: Government Rests.

Mr. Camp: I don't know what the proper time is, but at this time we renew our Motion to Strike the testimony of Mr. Robert E. Davis as to that portion of his testimony concerning the value of earth removed from his place, and that which would remain upon the 15 acres that was taken in which he has calculated by cubic yards at 8¢ per yard, and reached a figure of $8,000.00, for the reason that such a method of valuation rests upon pure speculation and conjecture, and is without factual support or presumption or suspect to the sale of land upon the same utility.

That the proper method is to view the whole and not the components in order to reach a value, and that the fact of the conjectural application of this method of arriving at a total value goes and is demonstrated by the conclusions which Mr. Davis proved, namely that the before market value was less than his total damages using this sort of a contrived method of calculation; and in support thereof we submit the case of United States versus 765.56 acres, cited in 174 Federal Supplement I, and the numerous cases cited therein, and which have all rejected this theory as a proper method.

Mr. Meacham: There is some misunderstanding on George's part as to what this witness testified to, which I hope isn't prevalent with the Commission. Here was this witness's testimony, there isn;t any question about that rule, that is the same rule we wrestled in the State
506 Courts as a very logical matter. That law is well settled, and I don't dispute it at all. It is perfectly sound. But here is what this witness testified to, I think perhaps we proceeded too fast, I guess because I verified it with the witness, verified it with my notes and Pepper's notes. Here is what the witness testified to, he testified as to various sales, we call it sand, they call it earth. I don't care what it was. It was worth something, it was materials, we will call it, and that is a term the government used, so it is permissible with me. He sold various materials, you can't show that type of a thing except as an indication of fair cash market value, but in any event no objection was made to that testimony when it was presented, no objection whatsoever, and all the cases hold that evidence is admissible in evidence to give an indication of what the fair cash market value is. That is what we are trying to determine, the fair cash market value.

Mr. Davis testified as to how deep and how wide and how long this tract was, and the portion, the length, width, breadth of the materials that were being sold, and he came up with a cubic yard figure. He said he was selling it so much a cubic yard. He said the total amount of the cubic yards would be $8,999.60. Then he testified, he is the landowner, he owns the property, then he testified that in his opinion the fair cash market value of that 5½ acres at that time was $8,000.00.

And under his case that is permissible. Under Oklahoma procedure that is permissible, Federal Procedure that is permissible, because what you are determining is the fair cash market value. He didn't figure the footage and say that is it. That is the value of this sandpit, or this material pit, but he said the fair cash market value of this acreage was $8,000.00.

George is worrying about my legal education, trying to explain to me what rebuttal is. I wouldn't want to tell the Court how long I have been practicing law, but much to George's amazement down here in the country I understand what rebuttal is. Our rebuttal testimony is not going to consist of getting George's ideas that he has had this case hid over there in his brief case and this country boy
507 didn't know about it. We could put on some more testimony, but a lawsuit isn't a deal to see who can trick each other.

A lawsuit is to try in our clumsy way to determine what the right answer is. In our testimony we don't want—I mean in our rebuttal testimony we want to straighten out anything about the fair cash market value, if we don't that is our problem.

What we propose to present in rebuttal evidence, it might not be necessary, I don't know, I want to be sure there isn't any mistake that there was plenty of this same material used out there for a considerable length of time after March 4, 1957. There was plenty of demand, and there *there* were other places this material could be used besides on the base. That was all the rebuttal we had in mind, and to clear up one little point, I don't think there is a heated dispute about it, I doubt the government would want to stipulate to it, the actual purchase price on the little Wood tract instead of $1,500.00 was $1,400.00.

Mr. Camp: As to that first rebuttal evidence, Davis's, I again say in despite of the fact you say you are out here in the country, and I happen to come from the country too, and I am aware how they do things in the country and hay they do things elsewhere, and you have through your testimony already covered every element of that sand that that man says that he disposed of on direct examination. Therefore, I think that is amply covered, and it would be a rehash of it, and not rebuttal; and to your other element, if you say someone would testify that, that was the value, we will stipulate that the man would so testify.

Mr. Meacham: I don't know whether stipulating a fellow would so testify, does that get the evidence in the record?

Mr. Whiteside: I think the stipulation would be if he were to testify that he would testify to certain facts.

Mr. Meacham: And that testimony would be a part of the record?

Mr. Whiteside: Yes.

508 Mr. Whiteside: The Motion of Mr. Camp will be reserved, a ruling on the Motion will be reserved.

ROBERT E. DAVIS, called as a rebuttal witness, having been heretofore duly sworn, testified as follows:

Direct examination by Mr. Meacham:

Q. State your name? A. Robert E. Davis.

Q. Are you one of the landowners in this suit who previously testified? A. Yes, sir.

Q. Did you hear the testimony of the Government in which some of the gentlemen said they had inquired of the manager of the Peter Kiewit & Sons, and of Lt. Commander Corn, and these gentlemen advised them that they had no particular further use for the type of materials that you previously testified that were on your land after March 4, 1957? Did you hear that testimony? A. Yes, sir.

Q. Is the statement that they attributed to the manager of Peter Kiewit and to Lt. Commander Corn the truth, or whatever inquiry was made. Is that correct? A. On no further use for that material?

Q. Yes. A. Worlds of that material used afterward.

Q. By worlds, you might mean one thing and I might mean something else. What do you mean, one cubic yard, one ton, or what? A. John Rainbolt sold—

Q. Did they use some of this material out there on the base after March 4th, 1957? A. Yes.

Q. Did they use many tons of it? A. They did.

509 Q. Were you selling this material whether it is sand, dirt or whatever it is, were you selling this material at the time the Government took your property away from you? A. Yes, at the time they served those condemnation papers on me.

Q. Was there another installation with the same type

of materials that you had open up about the time they closed yours? A. The John Rainbolt pit was opened up.

Q. How far is that from the base? A. Approximately 16 miles.

Q. The same gentleman or gentlemen that were buying from you at the time the government took the property from you, did they go to that pit 16 miles away and buy the same type of materials? A. Peter Kiewit opened up the John Rainbolt pit; L. M. Jones, Lufkin and Shelton opened up the pit across the road from the John Rainbolt pit.

Q. That was 16 miles away from the base? A. Yes.

Q. You are right on the edge of the base? A. At the south edge.

Q. You heard yesterday, you were here, when we had a little hassle about the 15.49 acre tract that was taken in fee, as to whether it was pasture land or cultivated land. You heard that testimony? A. Yes, sir.

Q. Now tell the Court, you owned that land, tell the Court just how much of that—do you know on the ground what constituted the fee taking on the ground? A. Yes.

Q. Was any of it cultivated land? A. I planted cotton and cultivated cotton an 8 acres of land they took away from me the year they took it.

Q. About half, a little more than half of it was cultivated? A. Yes, sir.

510 Examination by Mr. Gillespie:

Q. Mr. Davis, on this material that you were selling from this 15 acre tract, was this the same type of material that was being sold from the Rainbolt and the one across the road that you testified to here? A. They used that sand in identically the same use as my pit.

Q. Did they go on using material for an appreciable time? A. The Peter Kiewit had this runway out on my property, and he used this material the same as Nolen Brothers did, and mixed it in with this Granite rock, came from the same place. Nolen hauled granite up here and they did too, and mixed this sand with it and used it for the same purposes; and L. M. Jones and Lufkin, and Shelton was using my material for the base under these buildings, and they used material from the pit across from John Rainbolt's pit for the some purpose they used sand from my pit.

Q. For how long of a period of time? A. They are still using it, not the pit across the road but Kiewit is still using earth or material out of John Rainbolt's pit building this apron they are completing now.

Examination by Mr. Whiteside:

Q. Has there been any sand removed from your pit since the taking, that you know of? A. There where my pit was at, all of that material was removed, a portion of it has been removed.

Q. Do you know how much? A. No, they just come in there and hauled it back north. You mean on this fee taking land?

Q. Yes. A. Yes, sir.

Q. Has it been removed since March 8, 1957? A. Peter Kiewit came in there with those dozers, as I observed
511 them working there by it, and removed this material and hauled it back north and got that clay land from north there, and blended it in with it and built this base for this runway apron, and this approach on the south end of it.

Q. Have you talked to Peter Kiewit to determine how much material they used from the place that was formerly yours? A. No, sir.

Q. Do you have any opinion as to how much would have been used? A. I don't see any reason why I couldn't have sold it all, I don't know that I could.

Q. Did you have a contract with anyone for the sale of sand? A. Contract with Peter Kiewit, contract with Nolen Brothers.

Q. By the terms of that contract did you agree to furnish them so much sand, did they agree to purchase so much or what? A. They agreed to pay me so much per yard.

Q. They didn't agree on purely—they didn't agree to purchase any given amount, did they? A. No, sir.

Cross examination by Mr. Camp:

Q. That contract was limited for 90 days, wasn't it? A. No, sir.

Q. How long was it, what were the terms of the contract? Was it 60 days? A. They had a contract with an extension clause in it that they could get dirt out of that pit as long as they wanted to.

Q. It was a 90 day provision? A. With an extension clause in it, they could renew it at those figures anytime they wanted to. Nolen had a contract up there to use that material as long as they wanted it.

Q. This material that you are talking about that Rainbolt has, that is a sandpit where they wash the sand
512 and separate sand from the dirt? A. No. The dirt was hauled out identical the way mine was.

Q. It is your testimony that all of this that you are testifying about was sold to this base created market there wasn't another market you are talking about? A. The market I am talking about were on the base.

Q. That is all.

Examination by Mr. Whiteside:

A. There has been some testimony that soil was removed from the Merz place and used for the same purpose as this soil taken from your pit. Do you know anything about that? A. No, sir. I knew there was an area over there that was scraped off, but what they used it for I don't know.

Q. Are you familiar with the Merz farm? A. Yes.

Q. Does he have any soil the same as yours, this pit that I am talking about? A. No, sir, I don't think so. It is altogether a different soil up there, it might be used for a base material; it is a different material from John Rainbolt's material or mine either one.

Q. Mr. Rainbolt's material, is it different than yours? A. They used it for the same purpose.

Q. That isn't the question. I asked you it if was the same? A. I don't know whether it is identically the same, they are both sand.

Q. You never have seen any tests that were run on it? A. No, sir.

Q. That is all.

Further cross examination by Mr. Camp:

513 Q. The contract, as I understand, you had with Peter Kiewit was dated June 14, 1956 provided for the non-exclusive right to remove sand in quantities required, right to place and remove structures, to be paid 8¢ a cubic yard for material removed, paid for material re-

moved 10 days from the last of the month, material—I mean term was 90 days, with a term to extend it by notice 30 days from the expiration date, but the agreement was cancelled as of the date the land was condemned? A. That is right. They extended the contract, and I sold sand to Peter Kiewit beyond that period.

Q. But that was the provisions? A. Yes, sir.

Q. Did you harvest the cotton off of that 8 acres? A. Yes, sir.

Q. Who did you sell it to? A. I don't know whether I took a government loan on it, or sold it up there at the gin. I sold it up there at the gin.

Q. What did you get, 3 or 4 bales off of that 8 acres? A. I sold $2100.00 worth of cotton off of that tract, on 26 and some tenths acre allotment.

Q. $2600.00 and how many dollars? A. I said 26 acre allotment. $2100.00 plus dollars of cotton off of that place that year. I have the figures here somewhere.

Q. That was 1956 or 1957? A. 1956.

Q. You sold $2100.00 worth of cotton on 26 acre cotton allotment in 1956 off of this place? A. Yes.

Q. How much in bales? A. About—

Mr. Meacham: This is not proper cross examination. We just testified to how much of it was cultivated land.

Mr. Camp: He testified he planted 8 acres of cotton, and it is your theory this was supposed to be valuable land.

514 Mr. Whiteside: Overruled.

Mr. Meacham: Exception.

Q. Five bales of cotton brought $2,100.00?

Q. That is all.

Examination by Mr. Tisdal:

Q. How much allotment are you losing off by them taking this off of this 60 acres, by the fee taking? A. I combined that place with the place I own at home and the one east of Burns Flat, and I put all of them together. I put my home place and that together first, and when I lost that acreage they took a percentage of my cotton allotment, and a percentage of my wheat allotment. It would be 8 acres, just 8 acre loss and they figured up so much percent, a percent of 8 acres, a percentage of this cotton, and I lost a percentage of that 8 acres.

Examination by Mr. Whiteside:

Q. 8 acres in relation to all of the rest of your cultivated land, isn't it? A. No, I don't know the exact figure on that.

Q. How much cultivated land did you have in your contract? A. In the contract?

Q. With your place with your home place? A. At that time there was approximately 105 acres.

Q. All of your cultivated land? A. Yes, and then my home place and that place together; but the allotment on that place to start out with was approximately 26 acres.

Q. This 8 acres would be 100 to 10 approximately, in ratio? A. If I had left them together I would have lost approximately 4 acres of cotton.

515 Q. Did you lose less than 4 acres allotment? A. Wheat and cotton, when they got it together, would be approximately between 4 and 5 acres.

Q. That is all.

Recross examination by Mr. Camp:

Q. Cotton sells for about $140.00 a bale, or did that year, that would figure out approximately 15 bales for this 26 acres. Does that sound more like the price of cotton to you, Mr. Davis? A. That is more like it. I don't know the number of bales. I wrote down the amount of cotton that I sold off of it.

* * * * *

Stipulation

It is hereby stipulated and agreed that the witness, Elmo Guthrie, who testified that he has talked to the purchaser of the Wood tract, Sale No. 18, and was advised by the purchaser that the purchase price was $1,400.00.

It is further stipulated that this testimony is a part of this record.

Defendants Rest

Mr. Meacham: The Landowners Rest.

Mr. Camp: Government Close.

Mr. Meacham: We announce close.

[517] Plaintiff's Exhibit 1

Pltf Ex. 1

59

December 8 1.

TRACT No. A-104 E - House

TRACT No. A-104 E - Barn and Cattle Shed

Pltf. Ex 2

TRACT No. A-10h E- Barn

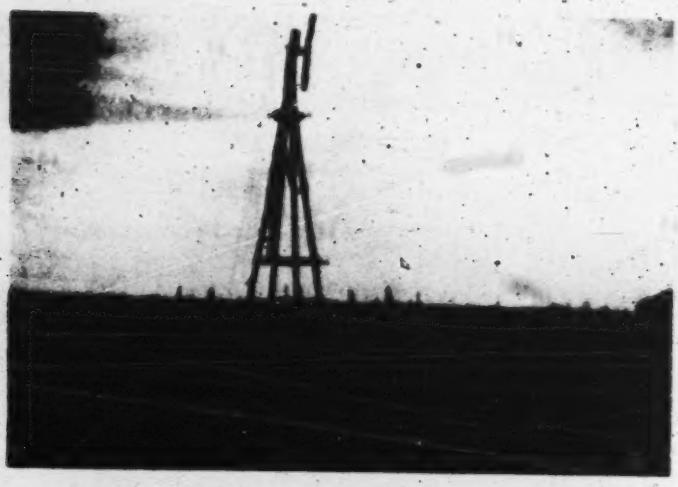
TRACT No. A-10L E- West Chicken House

Pltf Ex. 3

TRACT No. A-104 E -- Metal Granary

TRACT No. A-104 E - East Chicken House

Pltf Ex 4



TRACT No. A-101 5 - WINDMILL

TRACT No. A-101 5 - CAVE AND PRIVY

[525] **Plaintiff's Exhibit 5**

TRACT NO. A-118E

Plf Ex 5

CHICKEN HOUSE

DWELLING

EXHIBIT "A"

527 **Clerk's Note Re Exhibit "E"**

Government's exhibit "E" is a large "sales map". The original exhibit is on file in the Clerk's office.

Plaintiff's Exhibit 6

Treasurer's Endorsement

I hereby certify that I received $16.00 and issued receipt No. 870 therefor in payment of mortgage tax on the within mortgage.

Dated this 6 day of June 1957.

County Treas., Washita Co. Oklahoma By DORTHA BEECH
Deputy

This instrument was filed for record in my office on the 6 day of June, A. D. 1957, at 2—20 o'clock P.M., and duly recorded in Book 284 of Mortgages, Page 157-8. Fee, $———

DALE HUBBARD (SEAL)
County Clerk.

Place
Seal
Here

JUANITA BACCUS
Deputy.

No. 1501 Mortgage (Oklahoma Form) W. #E. Guthrie, etux To John Hancock Mutual Life Insurance Company, Boston, Massachusetts.

State of Oklahoma County of Washita ss.

Know All Men By By These Presents, That, We. W/ E. Guthrie and Bernice Guthrie, husband and wife of Washita County, State of Oklahoma, hereinafter called the mortgagor, which term shall be construed to include the singular and the plural, the masculine, the feminine and the neuter genders and the heirs, devisess, trustees, executors, administrators, successors and assigns of the mort-
528 gagor, hereby mortgage, convey and warrant to John Hancock Mutual Life Insurance Company, a corporation duly established under the laws of The Com-

monwealth of Massachusetts, with its principal office in Boston, Suffolk County, Massachusetts, hereinafter called tthe mortgagee, which term shall be construed to include the successors and assigns of the mortgagee, the following described real estate, in the County of Washita and State of Oklahoma, to-wit:

Lots Two (2) and Three (3) and the Southwest Quarter of the Northeast Quarter and the Southeast Quarter of the Northwest Quarter of Section Three (3), in Township Ten (10) North, of Range Nineteen (19) West of the Indian Meridian; and

The Southwest Quarter of Section Thirty-four (34), in Township Eleven (11) North, of Range Nineteen (19) West of the Indian Meridan;

containing 320.19 acres;

together with all the tenements, hereditaments, easements and appurtenances thereunto belonging and the rents, issues and profits thereof and together with all buildings and improvements now or hereafter erected upon said real estate and all fixtures, apparatus and equipment now or hereafter in said buildings or used in connection therewith or in the operation thereof, all of which shall be considered realty, whether or not the same are realty by attachments hereto, and shall be subject to the lien of this mortgage; all of *he* foregoing property is hereinafter designated as the premises.

To Have And To Hold, the said premises unto the mortgagee, its successors and assigns, forever.

As additional security for the payment of the debt hereinbefore described, the grantors herein assign to the mortgagee all rents, profits, revenues, royalties, rights and benefits accruing under any and all oil, gas, grazing, agricultural and other leases and rental contracts
529 : now on said realty, or which may hereafter be placed thereon, and grantors herein direct any lessee or beneficiary thereunder, on demand, to pay to the mortgagee herein all rentals, bonuses, royalties and other income that may be payable under the terms of any such lease or leases or rental contract or contracts whether oral or written provided that so long as no default occurs in the

payment of the debt secured by this mortgage, or in the performance by the grantors of any of the terms and conditions of this mortgage, the grantors, and their heirs, successors or assigns, shall be entitled to retain possession of the premises hereby conveyed, and (unless otherwise specially agreed in writing) shall be entitled to appropriate and use such income. This assignment shall terminate and become null and void upon this mortgage being released by the mortgagee.

The Mortgagor Hereby Covenants and Agrees:

That this mortgage is given to secure the performance and observance of the covenants and agreements herein contained and to secure the payment of the principal sum of Sixteen Thousand and 00/100—Dollars with interest thereon payable according to the terms of a certain note of even date, executed by W. E. Guthrie and Bernice Guthrie and delivered to the said John Hancock Mutual Life Insurance Company, and with interest thereon at the rate of ten per centum per annum while any default exists under the terms of said note or in the performance or observance of any of the covenants or agreements of this mortgage or of any instrument now or hereafter evidencing or securing said debt, all in accordance with the terms of said note.

That he is lawfully seized in fee simple of the premises; that he has good right to sell and convey the same as aforesaid; that the premises are free and clear of all *encumberances* and that he will warrant and defend the same unto the mortgagee against the lawful claims and demands of all persons.

To pay the note hereby secured and interest thereon in accordance with the terms thereof and also any other indebtedness that may accrue to the mortgagee under the terms of this mortgage.

That he will keep the premises in good repair; that he will not commit or suffer strip or waste on the premises; that no building structure or improvement on said premises shall be materially altered; removed or demolished without the written consent of the mortgagee; that he will not commit or suffer any act that will diminish the value of the premises; that he will not violate or suffer the violation of any law, by-law, ordinance or contract affecting the

premises and that he will not violate or suffer the violation of any covenant or agreement of record against the premises.

To pay before they become delinquent all taxes, assessments, water charges and all other charges that may now or hereafter be levied, assessed or become a lien upon the premises or any part thereof.

To keep the buildings and improvements now or hereafter erected upon the premises and all apparatus and fixtures now or hereafter in or used in connection with said buildings or improvements insured against loss or damage by fire, tornado and such other casualties as the mortgagee may from time to time require; that such insurance shall be in forms, in companies and in sums, not less than sufficient to avoid any claim on the part of the insurers for co-insurance, satisfactory to the mortgagee; that all insurance policies shall be held by, be for the benefit of and first payable in case of loss to the mortgagee and to deliver to the mortgagee at least fifteen days before expiration, a new and sufficient policy to take the place of any expiring policy. The mortgagor hereby assigns to the mortgagee all moneys recoverable under each policy and agrees that in the event of a loss, at the option of the mortgagee, the whole or any part of the amount collected may be applied by the mortgagee upon any indebtedness or obligation secured hereby, whether then due or not, or be used in replacing or restoring the buildings or improvements to a condition satisfactory to the mort-
531 gagee, or be released to the mortgagor; and the mortgagor further agrees that any one or more of the preceding alternatives may be elected by the mortgagee in whole or in part and in such order as the mortgagee may determine and that any amount used in replacing or restoring the building or improvements or released to the mortgagor shall not be deemed a payment on any indebtedness or obligation hereby secured. The mortgagor hereby appoints the mortgagee attorney irrevocable of the mortgagor to assign each policy in the event of the foreclosure of this mortgage or transfer of the title to the premises to the mortgagee in extinguishment of the debt hereby secured.

To pay all sums the failure to pay which may result

in the acquisition of a lien prior to the lien of this mortgage, before such prior lien may attach.

That upon default in the performance or observance of any of the covenants or agreements of this mortgage, the mortgagee, at its option, may make advances to perform the same on behalf of the mortgagor and the mortgagor shall repay to the *mortgdee* upon demand all sums so advanced together with interest from the date of payment at the rate of ten per centum per annum and all such sums shall be secured hereby and have the benefit of the priority of the lien of this mortgage, but no such advances shall relieve the mortgagor from any default under this mortgage or impair any right or remedy consequent thereon.

That if any suit is brought to foreclose this *morgage* or if the note hereby secured be placed in the hands of an attorney for collection, the mortgagor will pay ten per centum of the amount involved including principal and interest, but not less than the sum of one hundred dollars, to the plaintiff's attorney as attorney's fees; and all such fees and the costs of such suit, including the cost of a complete showing of title to said mortgaged premises by a complete abstract and opinion of title or title guarantee policy for the purpose of foreclosure, shall be immediately due and shall be secured hereby and have the benefit of the priority of the lien of this mortgage.

532 That the mortgagee shall be subrogated for further security to the lien, although released of record, of all encumbrances paid out of the proceeds of the loan secured by this mortgage.

That if any action or proceeding is commenced in which the holder of this mortgage is made a party by reason of the execution of this mortgage or the note which is secured or in which the mortgagee deems is necessary to defend or uphold the lien of this mortgage, or the priority thereof, or possession of said mortgaged premises, the mortgagor will repay to the mortgagee upon demand all sums paid by the mortgagee for expenses incurred in any such action or proceeding together with interest thereon from date of payment at the rate of ten per centum per annum and all such sums with interest thereon shall be secured hereby and have the benefit of the priority of the lien of this mortgage.

That all awards received as compensation for the taking of title to or any interest in the premises or any part thereof and all moneys received as damages for injury affecting the premises by virtue of the right of eminent domain or otherwise, are hereby assigned to the mortgagee; and that, at its option, the mortgagee may collect and re-receive the proceeds thereof and apply the whole or any part thereof to the payment of any amounts secured by this mortgage, whether then due or not, and release to the mortgagor any such proceeds not so applied.

That he will not convey the premises unless the deed obligates the grantee therein to assume and agree to pay the indebtedness hereby secured.

That the premises being located in the State of Oklahoma, this mortgage and the rights and indebtedness hereby secured shall, without regard to the place of contract or payment, be construed and enforced according to the laws of the State of Oklahoma; that it is not the intention of any party hereto to pay, charge, receive or retain a
533 greater amount of interest than is allowed by said laws, and if at any time any greater amount shall be paid, charged, received or retained, same shall be credited on said debt as of the date of payment thereof.

Now if said note is paid in accordance with its terms and if all of the terms, covenants and agreements thereof and of this mortgage are performed and observed, then this mortgage shall be null and void; but upon any default in the terms, covenants or agreements of said note or of this mortgage, then, at the election of the mortgagee, the whole of the indebtedness hereby secured shall become due and payable without notice and this mortgage shall become absolute and the mortgagee shall be entitled to possession of the premises and the rents, issues and profits thereof; and upon any such default the mortgagee may immediately foreclose this mortgage in the manner prescribed by law and shall be entitled to have a Receiver appointed without proof of any grounds for such appointment other than default as aforesaid, to take possession and charge of the mortgaged premises during the pendency of the foreclosure proceedings and the redemption period, and to rent the same and receive and collect the rents, issues and profits thereof under the direction of the Court, and any amounts collected by said receiver shall be applied

under direction of the Court to any judgment rendered or to any amounts due upon foreclosure; and in the event of foreclosure the Court shall direct the sale of the premises to be with or without appraisement as the mortgagee may elect at the time judgment is rendered.

Witness our hands this 31st day of May, A.D. 1957.

W. E. GUTHRIE
BERNICE GUTHRIE

[Verified.]

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534 **Clerk's Notes Re Exhibits 7-10, 12-16, 23, 28, 29, 31 and 33**

Plaintiff's exhibits 7-9, inclusive, and 13-16, inclusive, 23, 28, 29, 31 and 33, are not included in the record on appeal.

Government's exhibit 10 is a large map showing old and new leases. The original exhibit is on file in the Clerk's office.

Plaintiff's exhibit 12 is a map which was withdrawn by counsel and does not appear in the record on appeal.

Pltf. Exhibit 11 — Ex-11

1	1921–25	General Subsurface Geology J. E. Brantly, Box 328, Abilene, Texas Employed by Atlantic Refining Company, Tampico, Mexico EDUCATION	1.00	0 2.0	1.00 2.0	0	0	J. E. Brantly Box 328 Abilene, Tex.
2	1925–28	Supervision of Subsurface Geology and Asst. Supt. of Drilling and Production. Houston Petroleum Co., Tampico, Mexico (Included active supervision of 75,000 bbls. daily production and 50 drilling continuous wells)	.0	3.00	3.00	3.00	0	A. F. Proudfit, President Creole Petr.Corp. Caracas, Venezuela
3	1928–36	District Petroleum Production Engr. for Oklahoma & Kansas Amerada Petroleum Corporation, Tulsa, Oklahoma Application of Petroleum Engineering to production of oil and gas	0	8.00	8.00	8.00	5.00	C. V. Millikan Chief Engineer Amerada Petr.Corp. Box 2040 Tulsa, Okla.
4	1936–38	General Superintendent & Chief Engineer British American Oil Producing Co. - formerly of Tulsa, Okla., now Dallas, Texas Supervision of operations and application of Petroleum Engineering to production of oil and gas.	0	2.00	2.00	2.00	2.00	F. E. Smith Research Engr. British American Oil Prod. Co., Dallas, Texas
5 5a.	1938–41 1941–43	Consulting Engineer Wilcox Secondary Recovery Assn., Oklahoma City, Oklahoma Investigate possibility of secondary recovery from Wilcox sand. Consulting Engineer in oil & gas & Supt. of plant making shells for Dept. of Navy, Port Arthur, Texas	0	1.5 2.5	1.5 2.5	1.5 2.5	1.5 2.5	Dean McGee, Vice President Kerr-McGee Oil Co. Oklahoma City, Oklahoma
6	1943–45	General Superintendent and Chief Engineer Northern Ordnance, Inc., Tulsa, Oklahoma Supervision of Engineering, Drilling and Production of oil and gas operations in 14 states.	0	2.00	2.00	2.00	2.00	H. L. Scott, Claremore, Okla.
7	1945–54	Professor of Petroleum Production Engineering and Head of Department to 1951, University of Tulsa, Tulsa, Oklahoma (Half time teaching since 1951)	0	9.00	9.00	7.00	7.00	Dean A. L. Lansverheim University of Tulsa Tulsa, Okla. Dr. C.I. Pontius, Pres. University of Tulsa Tulsa, Okla.
8	1946–48	Consulting Petroleum Engineer to Department of Army and Department of Interior to evaluate damages to the mineral interests Osage Nation of Indians due to construction of Hulah Dam and Reservoir, Osage County, Oklahoma. Acted as Chairman of committee of three authorized by Congress.	0	2.00	2.00	2.00	2.00	Fred Houck Corps of Engineers Box 61 Tulsa, Oklahoma
9	June 1951 – Jan. 1954	Consulting Petroleum Engineer to Lands Division, Department of Justice to appraise damages to mineral interests in connection with flooding by Denison Dam and Reservoir (Lake Texoma, Okla. and Texas). Sole appraiser of damages to mineral interests in 205 Federal District Court cases and 42 Court of Claims cases involving in excess of 1,200 separate claims and approximately $30,000,000.00 against the United States.	0	(2.5)	2.5	2.5	2.5	Fred Morris Asst. Atty. Gen. 414 Nat. Mineral Building, Oklahoma City, Oklahoma

10 1952—Survey of oil and gas interests for DPR, Keystone Dam and Reservoir, Corps of Engineers, Tulsa District.

11 1954—Consultant and expert witness for U. S. Attorney,
1959 Eastern District of Texas—condemnation Texarkana Dam and Reservoir (covers Civil Actions on approximately 1100 tracts of land).

12 1955—Report on impairment to values of mineral interests in Garrison Dam and Reservoir for U. S. Army Engineers, Garrison District, Riverdale, North Dakota.

13 1955—Report and expert witness for U. S. Attorney, Western District of Louisiana in condemnation on impairment to mineral values on drilling and exploration moratorium, Camp Polk and Peason Ridge Artillery Ranges, Louisiana. (66,000 ac.)

14 1955—Appraisal of mineral values on Ferrells Bridge Dam Site near Jefferson, Texas for U. S. Army Engineers, New Orleans, District.

15 1955—Appraisal for U. S. Attorney, Western District, Arkansas, covering values of oil and gas interests in condemnation of tracts along Arkansas River.

16 1955—Estimate of reserves and depletion dates for Oologah Dam and Reservoir, U. S. Army Engineers, Tulsa District.

17 1955—Appraisal Report for U. S. Army Engineers, Little Rock District, on mineral interests, Barksdale Air Force Base, Shreveport, Louisiana.

18 1955—Consultant to U. S. Army Engineers, Tulsa Dis-
1957 trict, and U. S. Attorney, Eastern District of Texas, appraisal of mineral values for clearance easements, Perrin Air Force Base, Grayson County, Texas

19 1956—Appraisal Abilene Air Force Base, Texas, Corps of Engineers, Fort Worth, Tex.

20 1956—Appraisal report and trial on mineral values
1957 Clinton-Sherman Air Force Base, Oklahoma for U. S. Attorney, Oklahoma City, Oklahoma.

21 1957—Appraisal of value of mineral estates (oil and gas) for Elgin Dam and Reservoir Project for City of Lawton, Oklahoma.

22 1957—Appraisal of damage to oil and gas interests in
1959 condemnation proceedings on Oahe Dam and Reservoir Project, South Dakota for U. S. Attorney, Sioux Falls, S. D.

23 1957—Appraisal of oil and gas interests, Ft. Cobb and
1958 Foss Projects, Bureau of Reclamation, Anadarko, Oklahoma.

24 1958—Appraisal of mineral values, Pantex Ordnance Plant, Texas for GSA, Dallas, Tex.

25 1959—Appraisal of mineral values, Webb Air Force Base, Texas, U. S. Army Engineers, Fort Worth District.

26 1958—Contract jointly with Wm. H. Spice, San Antonio,
1959 Tex. to appraise mineral damages in entire Ferrells Bridge Project, Marion County, Tex. for U. S. Army Engineers, New Orleans District.

4. AFFIDAVIT
(To Be Executed By Applicant)

STATE OF OKLAHOMA }
County of TULSA } ss.

Carroll V. Sidwell, being first duly sworn, deposes and says:

I have read the contents hereof, and to the best of my knowledge and belief the foregoing statements are true in substance and effect, and are made in good faith. Furthermore, I understand that this certificate, if issued, will not constitute any form of legal registration but that it is intended only as information for State Boards of Engineering Registration. It is also understood that each Board reserves the right to accept or reject any or all information contained herein.

Subscribed and sworn to before me this 17th day of February, 1954

(SEAL)

My Commission expires Dec. 7, 1954

(Signature of Applicant)

Ione O'Kane
(Signature of Notary Public)

5. VERIFIED PROFESSIONAL RECORD

The foregoing professional record of Carroll V. Sidwell has been independently investigated and all information shown therein has been verified, except the items listed below:

Section	Item	Reason not verified
5	2	No reply from reference.

(SEAL)

NATIONAL BUREAU OF ENGINEERING REGISTRATION

Date May 11, 1954

T. Keith Legare
(Signature of Secretary)

6. CERTIFICATE OF QUALIFICATION

The Verified Professional Record of Carroll V. Sidwell has been evaluated and on this record he is hereby certified to State Boards of Engineering Examiners or Registration as possessing the minimum qualifications specified in provision "2c" of the requirements for certification of the National Bureau of Engineering Registration.

(SEAL)

NATIONAL BUREAU OF ENGINEERING REGISTRATION

Date May 18, 1954

T. Keith Legare
(Signature of Secretary)

8. ENDORSEMENT BY STATE BOARD

This is to certify that CARROLL V. SIDWELL of is legally registered with this Board and the following is the record pertaining to his registration in this State.

Number and date of Certificate: 941 April 29, 1939 Classification: Prof. Engineer

Is Certificate now in force? Yes Has Certificate ever been revoked? Yes - failure to renew

Was written examination given? No If not, how registered? Sec. 13 - 4 yrs education, 10 yrs experience

If examined, give subjects covered:

OKLAHOMA
(State)

State Board of Registration
for Professional Engineers
(Designation of Board)

(SEAL)

Assistant Secretary
(Signature and Title of Officer)

Date February 11, 1954

(January, 1952) No. 1771

IMPORTANT—Do not fill in until you read and understand this form and the "Instruction Sheet."

NATIONAL BUREAU OF ENGINEERING REGISTRATION

Conducted by

NATIONAL COUNCIL OF STATE BOARDS OF ENGINEERING EXAMINERS

VERIFIED PROFESSIONAL RECORD AND CERTIFICATE OF QUALIFICATION

1. GENERAL INFORMATION

Date February 10, 1954

Name in full CARROLL V. SIDWELL

Residence Address 2221 East 24th St. City Tulsa State Okla.

Present position (Title and Firm Name) Professor Petroleum Engineering, University of Tulsa

Business Address P. O. Box 1607 City Tulsa 9 State Okla.

Birthplace Boulder, Colorado Date of Birth May 10, 1902 Citizenship American

(Give names and addresses of five references, not relatives, not business associates, not also given under Section 4, who are registered engineers having personal knowledge of your character and professional reputation.)

Name	Address	Position
✓Wanenmacher, J. M.	629 Kennedy Building, Tulsa	Vice-Pres.
✓Bale, Hubert E.	6407 Desco Drive, Dallas, Tex. (Texas No. 9592)	President
✓Keplinger, C. H.	629 Kennedy Building, Tulsa (Okla. No. 501)	President
✓Elkins, Lloyd E.	Stanolind Oil Co. Research Center Box 591, Tulsa, Okla. (Okla. No. 1558)	Research Engr.
✓Beardmore, Herbert F.	Warren Petr. Corp., 801 City Natl. Bank Bldg., Houston, Tex. (Okla. 4014)	Vice President

2. EDUCATION

(State in chronological order the name and location of each high or preparatory school, college, university, or technical school attended, the dates spent at each, and if graduate, the year of graduation, also list graduate work, evening school, correspondence school, research work, etc.)

Name and Location of Institution	Years From-To	Date Graduated	Technical Course	Degree Received
✓Central High School, Oklahoma City, Oklahoma	1915-19	1919		
✓University of Oklahoma, Norman, Oklahoma	1919-23 1923-24	1923	Geology Graduate work and Teaching Fellowship in Geology	B.S.

3. REGISTRATION

Registered in state of which a resident: (Name State) ✓Oklahoma (No. 941)

State of first registration: (Name State) ✓Oklahoma Have you been denied registration in any State? No

Have you passed a written examination for registration? No

Other States in which registered ✓Texas (No. 5491)

4. MEMBERSHIP IN SOCIETIES, ASSOCIATIONS, OR INSTITUTES
(Professional, Scientific or Technical)

Name of Organization	Address	Grade of Membership	Date
✓Amer. Assn. Petr. Geologists, Tulsa, Okla.			1927
✓A.I.M.M.E.	29 W. 39th, N.Y., N.Y.		1932
✓Society Amer. Military Engineers, Washington, D.C.			
Engineers Club	Tulsa, Oklahoma		

GOVERNMENT'S EXHIBIT 18

GOVERNMENT'S EXHIBIT 19

GOVERNMENT'S EXHIBIT 17.

539 **Plaintiff's Exhibit 20**

Davis

Clinton-Sherman Air Force Base

Merz—Tract No. A-104E
Ownership—160.00 Acres
Easement —134.70 Acres

Value Before Taking		
Lands, surface	$14,800.00	
Improvements	3,200.00	
Minerals—unleased	4,800.00	
Total	$22,800.00	
Value After Taking		
Lands, surface	$12,450.00	
Improvements	1,300.00	
Minerals—unleased	800.00	
Total	$14,550.00	
Value Before Taking		$22,800.00
Value After Taking		$14,550.00
Total Damages		$ 8,250.00

Plaintiff's Exhibit 21

Davis

Clinton-Sherman Air Force Base

Guthrie—Tract No. A-106E
Ownership—160.00 Acres
Easement — 83.70 Acres

Value Before Taking		
Lands, surface	$ 8,100.00	
Improvements	11,900.00	
Minerals—Lessor's interest	2,400.00	
Total	$22,400.00	
Value After Taking		
Lands, surface	$ 7,900.00	
Improvements	11,900.00	
Minerals—Lessor's interest	1,900.00	
Total	$21,700.00	
Value Before Taking		$22,400.00
Value After Taking		$21,700.00
Total Damages		$ 700.00

540 **Plaintiff's Exhibit 22**

Davis

Clinton-Sherman Air Force Base

Kerkoff—Tract No. A-107E
Ownership—200.00 Acres
Easement — 80.10 Acres

Value Before Taking		
Lands, surface	$12,935.00	
Improvements	7,065.00	
Minerals—Lessor's interest	3,000.00	
Total	$23,000.00	
Value After Taking		
Lands, surface	$12,735.00	
Improvements	7,065.00	
Minerals—Lessor's interest	2,500.00	
Total	$22,300.00	
Value Before Taking		$23,000.00
Value After Taking		$22,300.00
Total Damages		$ 700.00

Plaintiff's Exhibit 24

Davis

Clinton-Sherman Air Force Base

Smith—Tract No. A-119E
Ownership—140.00 Acres
Easement —138.73 Acres

Value Before Taking		
Lands, surface	$18,020.00	
Improvements	5,480.00	
Minerals—unleased	4,900.00	
Total	$28,400.00	
Value After Taking		
Lands, surface	$17,620.00	
Improvements	5,480.00	
Minerals—unleased	700.00	
Total	$23,800.00	
Value Before Taking		$28,400.00
Value After Taking		$23,800.00
Total Damages		$ 4,600.00

541 **Plaintiff's Exhibit 25**

Davis

Clinton-Sherman Air Force Base

Rogers—Tract No. A-122E
Ownership—160.00 Acres
Easement — 11.52 Acres

Value Before Taking		
Lands, surface	$22,820.00	
Improvements	3,980.00	
Minerals—Lessor's Interest	2,800.00	
Total	$29,600.00	
Value After Taking		
Lands, surface	$22,520.00	
Improvements	3,980.00	
Minerals—Lessor's Interest	2,800.00	
Total	$29,300.00	
Value Before Taking		$29,600.00
Value After Taking		$29,300.00
Total Damages		$ 300.00

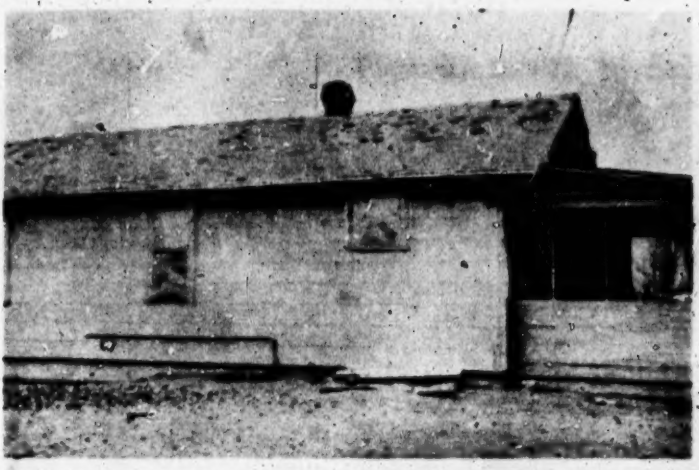
Plaintiff's Exhibit 26

Davis

Clinton-Sherman Air Force Base

Hoover—Tract No. A-124E
Ownership—160.00 Acres
Easement — 40.00 Acres

Value Before Taking		
Lands, surface	$23,400.00	
Improvements	2,200.00	
Minerals—unleased	5,600.00	
Total	$31,200.00	
Value After Taking		
Lands, surface	$23,000.00	
Improvements	2,200.00	
Minerals—unleased	4,400.00	
Total	$29,600.00	
Value Before Taking		$31,200.00
Value After Taking		29,600.00
Total Damages		$ 1,600.00



TRACT A-124E
CHARLES M.
HOOVER ESTATE

545 **Plaintiff's Exhibit 30**

Davis

Clinton-Sherman Air Force Base

Davis—Tract No. A-118E
Ownership—60.00 Acres
Easement —50.25 Acres

Value Before Taking		
Lands, surface	$5,875.00	
Improvements	1,125.00	
Minerals—Lessor's interest	1,050.00	
Total	$8,050.00	
Value After Taking		
Lands, surface	$5,675.00	
Improvements	1,125.00	
Minerals—Lessor's interest	150.00	
Total	$6,950.00	
Value Before Taking		$8,050.00
Value After Taking		$6,950.00
Total Damages		$1,100.00

Plaintiff's Exhibit 32

Davis

Clinton-Sherman Air Force Base

Davis—Tract No. A-142E
Ownership—44.51 Acres
Easement —43.63 Acres

Value Before Taking		
Lands, surface	$5,300.00	
Improvements	None	
Minerals—Owner's Residual Value	110.00	
Total	$5,410.00	
Value After Taking		
Lands, surface	$4,200.00	
Improvements	none	
Minerals—Owner's Residual Value	110.00	
Total	$4,310.00	
Value Before Taking		$5,410.00
Value After Taking		4,310.00
Total Damages		$1,100.00

546 **Plaintiff's Exhibit 34**

Houck

Clinton-Sherman Air Force Base

Merz—Tract No. A-104E
Ownership—160.00 Acres
Easement —134.70 Acres

Value Before Taking		
Lands, Surface	$17,000.00	
Improvements	3,250.00	
Minerals, unleased	4,800.00	
Total	$25,050.00	
Value After Taking		
Lands, surface	$15,400.00	
Improvements	1,250.00	
Minerals, unleased	800.00	
Total	$17,450.00	
Value Before Taking		$25,050.00
Value After Taking		17,450.00
Total Damages		$ 7,600.00
Removal Of Trees		$ 50.00

Plaintiff's Exhibit 35

Houck

Clinton-Sherman Air Force Base

Guthrie—Tract No. A-106E
Ownership—160.00
Easement — 83.70

Value Before Taking		
Lands, surface	$10,000.00	
Improvements	12,000.00	
Minerals, Lessor's interest	2,400.00	
Total	$24,400.00	
Value After Taking		
Lands, surface	$ 9,800.00	
Improvements	12,000.00	
Minerals—Lessor's interest	1,900.00	
Total	$23,700.00	
Value Before Taking		$24,400.00
Value After Taking		23,700.00
Total Damages		$ 700.00

547 **Plaintiff's Exhibit 36**

Houck

Clinton-Sherman Air Force Base

Kerkoff—Tract No. A-107E
Ownership—200.00 Acres
Easement — 80.10 Acres

Value Before Taking		
Lands, surface	$13,500.00	
Improvements	7,500.00	
Minerals—Lessor's Interest	3,000.00	
Total	$24,000.00	
Value After Taking		
Lands, surface	$13,300.00	
Improvements	7,500.00	
Minerals—Lessor's Interest	2,500.00	
Total	$23,300.00	
Value Before Taking		$24,000.00
Value After Taking		23,300.00
Total Damages		$ 700.00

Plaintiff's Exhibit 37

Houck

Clinton-Sherman Air Force Base

Smith—Tract No. A-119E
Ownership—140.00 Acres
Easement —138.73 Acres

Value Before Taking		
Lands, surface	$15,000.00	
Improvements	5,500.00	
Minerals—unleased	4,900.00	
Total	$25,400.00	
Value After Taking		
Lands, surface	$14,800.00	
Improvements	5,500.00	
Minerals—unleased	700.00	
Total	$21,000.00	
Value Before Taking		$25,400.00
Value After Taking		21,000.00
Total Damages		$ 4,400.00

548 Plaintiff's Exhibit 38

Houck

Clinton-Sherman Air Force Base

Rogers—Tract No. A-122E
Ownership—160.00 Acres
Easement — 11.52 Acres

Value Before Taking		
Lands, surface	$22,000.00	
Improvements	3,500.00	
Minerals—Lessor's interest	2,800.00	
Total	$28,300.00	
Value After Taking		
Lands, surface	$21,800.00	
Improvements	3,500.00	
Minerals—Lessor's interest	2,800.00	
Total	$28,100.00	
Value Before Taking		$28,300.00
Value After Taking		$28,100.00
Total Damages		$ 200.00

Plaintiff's Exhibit 39

Houck

Clinton-Sherman Air Force Base

Hoover—Tract No. A-124E
Ownership—160.00 Acres
Easement — 40.00 Acres

Value Before Taking		
Lands, surface	$21,500.00	
Improvements	2,500.00	
Minerals—unleased	5,600.00	
Total	$29,600.00	
Value After Taking		
Lands, surface	$21,300.00	
Improvements	2,500.00	
Minerals—unleased	4,400.00	
Total	$28,200.00	
Value Before Taking		$29,600.00
Value After Taking		28,200.00
Total Damages		$ 1,400.00

549 **Plaintiff's Exhibit 40**

Houck

Clinton-Sherman Air Force Base

Davis—Tract No. A-118E
Ownership—60.00 Acres
Easement —50.25 Acres

Value Before Taking		
Lands, surface	$5,000.00	
Improvements	1,200.00	
Minerals—Lessor's interest	1,050.00	
Total	$7,250.00	
Value After Taking		
Lands, surface	$4,800.00	
Improvements	1,200.00	
Minerals—Lessor's interest	150.00	
Total	$6,150.00	
Value Before Taking		$7,250.00
Value After Taking		$6,150.00
Total Damages		$1,100.00

Plaintiff's Exhibit 41

Houck

Clinton-Sherman Air Force Base.

Davis—Tract No. A-142
Ownership—60.00
Fee —15.49

Value Before Taking		
Lands, surface	$6,000.00	
Improvements	1,200.00	
Minerals—Owner's residual value from Tract No. 118-E	150.00	
Total	$7,350.00	
Value After Taking		
Lands, surface	$4,775.00	
Improvements	125.00	
Minerals—Owner's residual value	110.00	
Total	$5,010.00	
Value Before Taking		$7,350.00
Value After Taking		$5,010.00
Total Damages		$2,340.00

Houck

Clinton-Sherman Air Force

Davis—Tract No. A-142E
Ownership—44.51 Acres
Easement —43.63 Acres

Value Before Taking		
Lands, surface	$4,775.00	
Improvements	125.00	
Minerals—value after fee taking	110.00	
Total	$5,010.00	
Value After Taking		
Lands, surface	$3,975.00	
Improvements	125.00	
Minerals—value after easement taking	110.00	
Total	$4,210.00	
Value Before Taking		$5,010.00
Value After Taking		4,210.00
Total Damages		$ 800.00

Clerk's Note Re Land Owners' Exhibits A-D

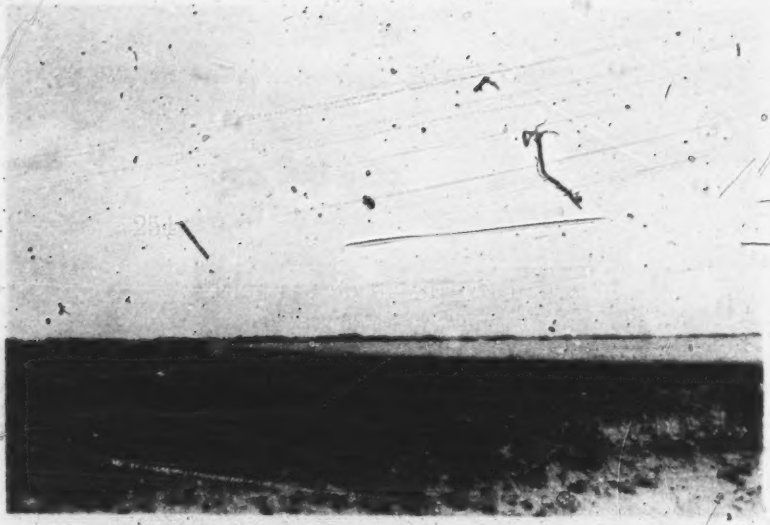
Land owner's Exhibits A-D, inclusive, are the following:

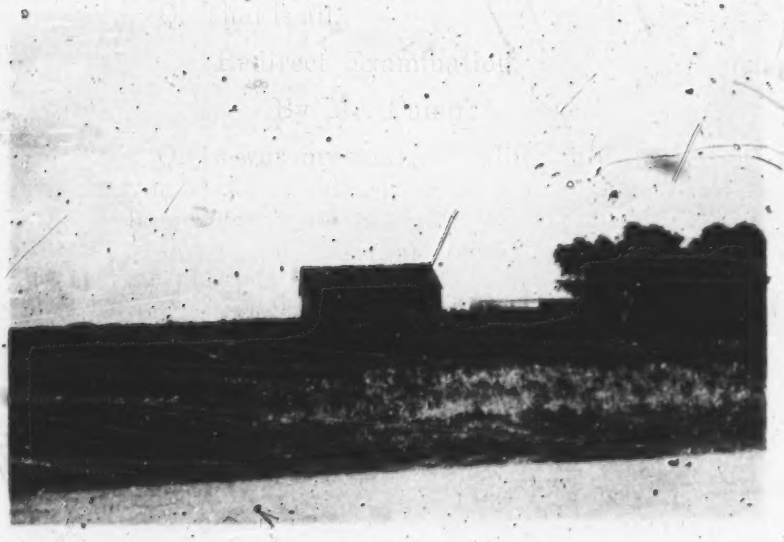
A—Plan view of south approach clearance easements;
B—Plan view of north approach clearance easements;
C—Profile of south approach clearance easements;
D—Profile of north approach clearance easements.

The original exhibits are on file in the Clerk's office.

INDEX SALE NO. 1

INDEX SALE NO. 3





INDEX SALE NO. 4

INDEX SALE NO. 5

INDEX SALE NO. 6

INDEX SALE NO. 7

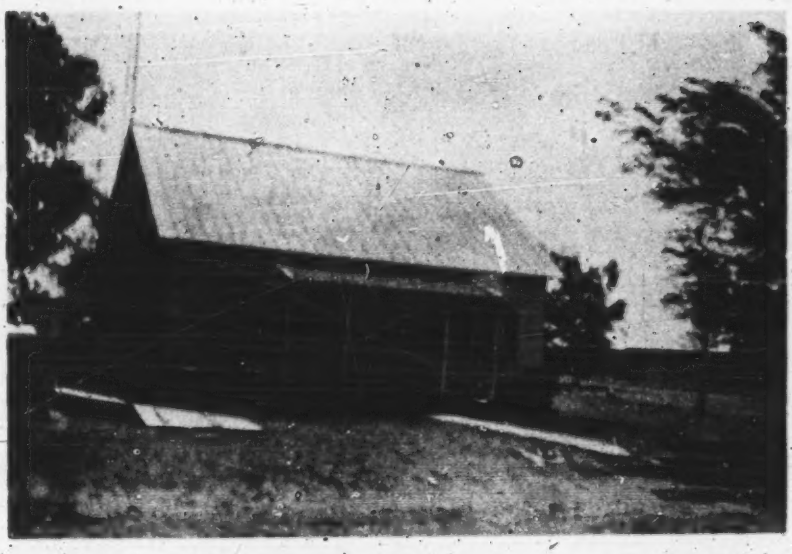
INDEX SALE NO. 8

INDEX SALE NO. 9

INDEX SALE NO. 10

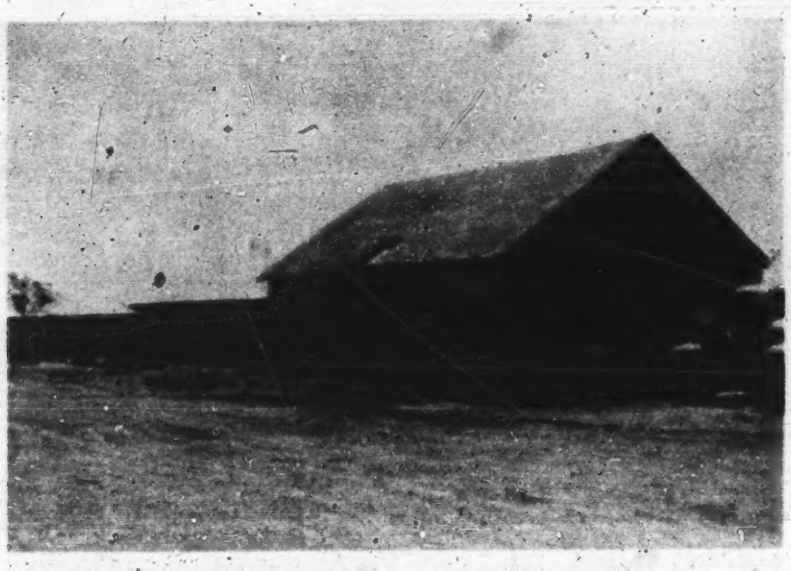
INDEX SALE NO. 11

INDEX SALE NO. 12

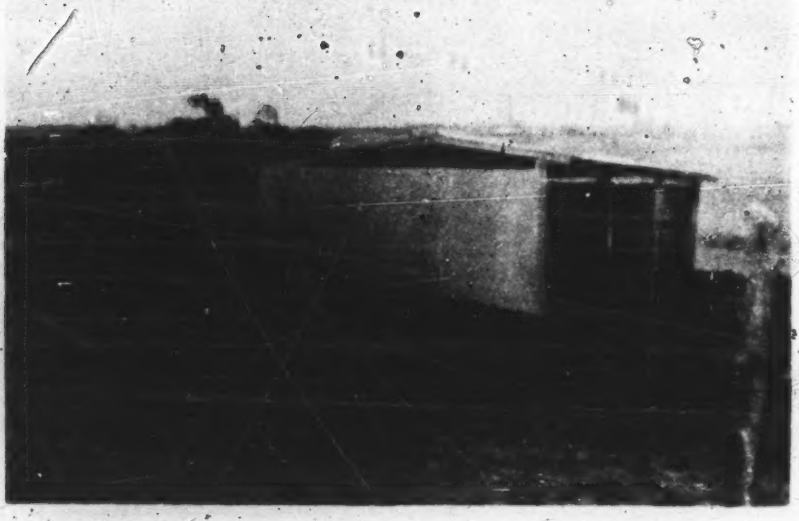


TRACT A-106 E - THE HOUSE

TRACT A-106 E - THE MILKING PARLOR



TRACT A-106 E - BARN & CATTLE SHED



TRACT A-106 F - DAIRY CATTLE SHED

TRACT A-106 E - CAVE & WELL HOUSE

TRACT A-106 E - CORRAL FENCING

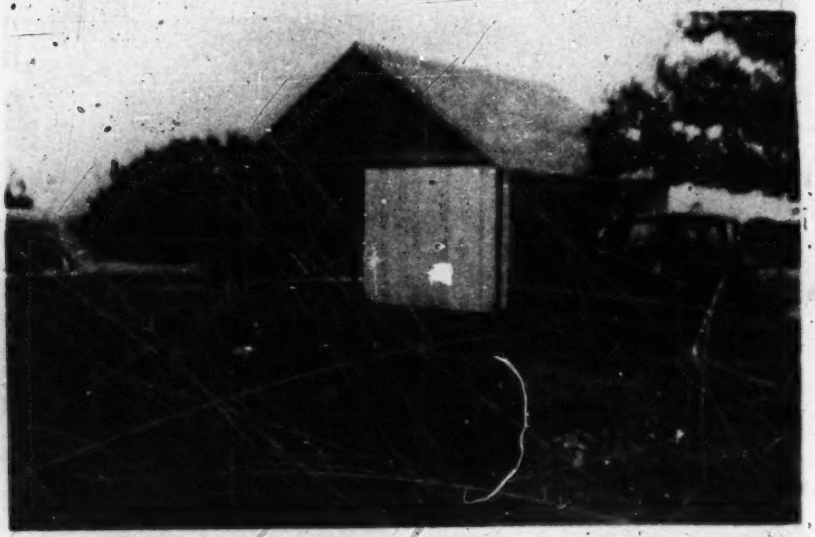
TRACT A-106.5 - GARAGE & IMPLEMENT SHED

TRACT A-106 E - CALF SHED AT BARN

TRACT A-106 E - CHICKEN HOUSE

TRACT A-106 E - BROODER HOUSE

TRACT A-107 E - THE HOUSE



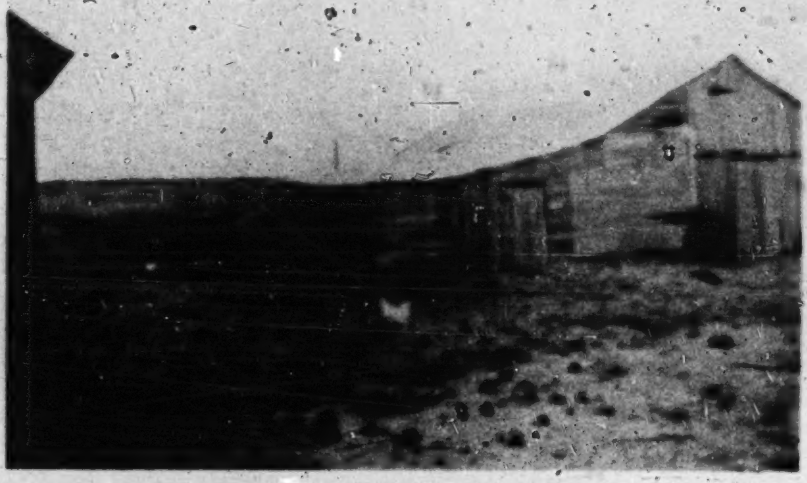
TRACT A-107 E - The Garage

- TRACT A-107 E - UTILITY HOUSE

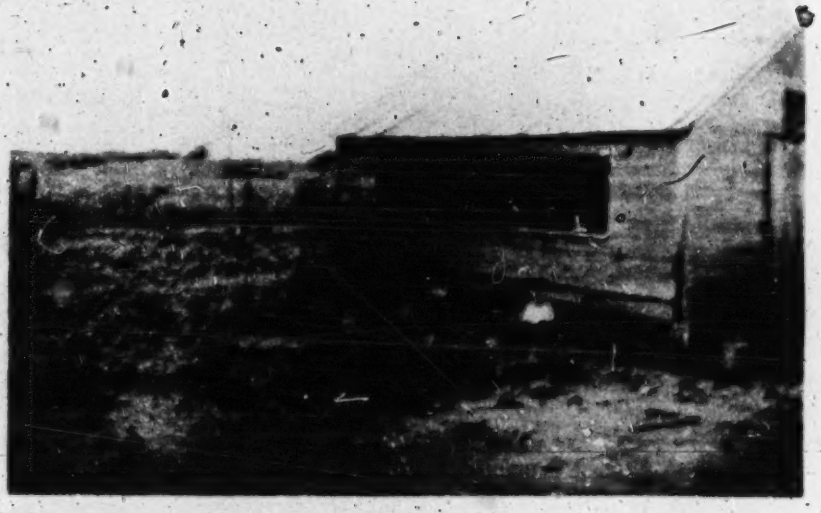
TRACT A-107 E - BROODER HOUSE

TRACT A-107 E - NORTH CHICKEN HOUSE

TRACT A-107 E - HOG SHED



TRACT A-107 E - THE BARN



TRACT A-107 S - SOUTH CHICKEN HOUSE

TRACT [illegible]
E. E. SMITH

TRACT A-1233
HENTER KINNEY
ROGERS, ETAL

Chicken House

TRACT A-118E,
A-142 & A-142E
ROBERT E. DAVI

The House

587 **Clerks' Certificates**

(Omitted in printing)

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588 IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Minute Entry of Argument and Submission—June 5, 1962

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard, Raymond Zagone, Esquire, appearing for appellant, D. W. Meacham, Esquire, appearing for appellees.

On motion, appellant was granted leave to file a reply brief in this cause instanter, which was accordingly done.

Thereupon this cause was argued by counsel and submitted to the court.

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589 IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6772—June Term—1962

Appeal from the United States District Court for the Western District of Oklahoma

UNITED STATES OF AMERICA, *Appellant*,

vs.

LOUIS T. MERZ, LEO J. MERZ, MINARD HENDERSON AND GRACE HENDERSON; W. E. GUTHRIE, BERNICE GUTHRIE AND FEDERAL LAND BANK OF WICHITA, WICHITA, KANSAS; JOHN KERKOFF AND KATHARINE H. KERKOFF; ROBERT E. DAVIS AND MAMIE DAVIS; E. E. SMITH AND PEARL T. SMITH; BERTHA KINNEY ROGERS, JUANITA KINNEY NAGEL AND WANDA KINNEY RIGGINS; CHARLIE O. RIVERS AND MYRTLE RIVERS, EARL LEVERTON, NETTIE E. BRYAN, L. T. ARMSTRONG, WAYNE ARMSTRONG, MARY INDIANA ARMSTRONG, a/k/a MARY I. ARMSTRONG, a/k/a MRS. T. H. ARMSTRONG, FAY KLIEWER; AND ELLA B. HOOVER AND FEDERAL LAND BANK OF WICHITA, WICHITA, KANSAS, *Appellees*.

590 Raymond N. Zagone, Dept. of Justice, Washington, D. C. (Ramsey Clark, Assistant Attorney General, Washington, D. C., B. Andrew Potter, U. S. Attorney, Oklahoma City, Oklahoma, and Roger P. Marquis, Dept. of Justice, Washington, D. C., on the brief), for Appellant.

Denver W. Meacham, of the firm of Meacham, Meacham & Meacham, Clinton, Oklahoma, (Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, William J. Holloway, Jr., and Paul R. McDaniel, all of Oklahoma City, Oklahoma, with him on the brief), for Appellees.

Opinion—July 7, 1962

Before PHILLIPS, PICKETT AND LEWIS, Circuit Judges

PICKETT, Circuit Judge.

This is a proceeding by the United States to obtain by condemnation clearance easements[1] over neighboring
591 land for use as airplane approaches to Clinton-Sherman Air Force Base in Washita County, Okla-

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[1] The easements taken were described as:

"(1) The continuing perpetual right to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon, extending into, extending above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as described in Schedule 'Z'.

(2) The continuing perpetual right to remove, to raze, to destroy, and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above the Glide Angle Plane and/or Transitional Surface as described in Schedule 'Z'.

(3) The right to ingress to, egress from, and passage on the lands described in Schedule 'A' for the purpose of exercising the rights hereby taken for said public uses. Reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns, all rights, titles, interests and privileges as may be exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses."

Schedule "Z" described runway approach zones extending laterally and longitudinally from the existnig runways. The Glide Angle Plane was defined as:

"The glide angle plane is a trapezoidal plane extending over the runway approach zone starting at an elevation equivalent to the center line elevation at the end of the runway and sloping upward from the narrower end at a rate of 1 foot vertically for each 50 feet horizontally."

homa. The right to acquire the easements is not disputed. The district court referred the question of adequate compensation to a commission. This is an appeal from a judgment approving and confirming the commission's awards of compensation to be paid to the owners of the tracts of land affected by the taking.

Rule 71A (h), Fed. R. Civ. P., authorizes the district court to appoint a commission of three to determine the issue of compensation to be paid by the United States in land condemnation cases. The commission has the powers of a master as provided for in Rule 53(c), Fed. R. Civ. P., and the proceedings are governed by paragraphs (I) and (II) of subdivision (d) thereof. The report and findings of the commission shall have the effect, and be dealt with by the court in accordance with the practice, set forth in Rule 53(e) (II). United States v. Waymire, 10 Cir., 202 F. 2d 550. The court's order of reference did not
592 require findings of fact and conclusions of law, and it limited the commission's duties to determining the amount of damages to be paid to the landowners.

Just compensation means the full equivalent in money for the property taken. United States v. Miller, 317 U.S. 396. Since the taking of the property by eminent domain is not a voluntary transfer the determination of just compensation is an informed guess or estimate based upon the best available criteria of value. Kimball Laundry Co. v. United States, 338 U.S. 1, 7 A.L.R. 2d 1281. Usually it is described as the fair market value of the property when taken. United States v. Silver Queen Mining Co., 10 Cir., 285 F. 2d 506. The determination, however, cannot be reduced to a rigid and fixed rule or formula. United States v. Commodities Trading Corp., 339 U.S. 121; United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396; United States v. Cors, 337 U.S. 325. "The guiding principle . . . is reimbursement to the owner for the property interest taken." United States v. Virginia Electric & Power Co., 365 U.S. 624, 633.

It was stipulated that the highest and best use of the eight tracts of land involved on this appeal was for general agricultural purposes. There was no evidence that
593 the land had any other value except for minerals. The owners of the different tracts testified as to

the value of their lands and the amount of damages which the easements caused to them. Appraisers for the United States determined the values, including the mineral values, of the tracts to be substantially less than that fixed by the respective landowners, and their opinions as to damages were comparably smaller. In addition, an appraiser, A. L. Willcox, testified on behalf of the landowners, and, using a formula of his own development, he arrived at an opinion as to the damages to the land by equating the taking of the air space above it to the taking of an undivided portion of the surface.[2] The application of this formula resulted in damages substantially higher than those arrived at by the landowners or
594 the appraisers for the United States.

The commission, after viewing the premises, filed a report which cited the order of reference, and contained ultimate findings as to the amount of compensation to be paid to each landowner. The United States objected to the adequacy of this report, but made no request for specific findings. Thereafter an additional and supplemental report, which included findings of fact, was filed.[3] In objecting to this report, the United States alleged that the Commission had failed to make specific findings as to the facts upon which the valuation was based, and further that the report wholly failed to show how conflicting evidence was re-

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[2] The formula used by Willcox assumed that no damage to the surface would result from the taking of air space above an altitude of 200 feet. It also assumed an absolute taking if the air space taken reached ground level. Under the formula damages were computed as ½ of 1% of the value of the surface for each foot of the average air space taken below 200 feet. This average was computed as 200 minus one-half of the sum of the altitudes of the Glide Angle Plane as it passed over the opposite boundaries of each tract. He valued the minerals separately, and considered them as taken completely if the average altitude of the Glide Angle Plane was lower than the height of an average oil drilling rig.

[3] This subsequent report made findings as to the height of the clearance easement over each tract, together with a finding that the highest and best use of the land was for agricultural purposes, and concluded that: "The amount of just compensation for each land owner involved is the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking, being the demunition (sic) of said fair cash market value caused solely and directly by the taking; . . ."

solved.[4] Relying on United States v. 2,477.79
595 Acres of Land, 5 Cir., 259 F. 2d 23; United States v. Buhler, 5 Cir., 254 F. 2d 876; and United States v. Cunningham, 4 Cir., 246 F. 2d 330, it contends that the findings are inadequate for a proper reveiw of the proceedings and that the case should be remanded for more adequate findings.

The parties were in agreement as to the type of land over which the easements were taken, and its highest and most profitable use. Generally, the witnesses arrived at their estimates of damages to the land by determining the difference between the market value before the taking of the easement and the market value thereafter. This is the normal method of valuing damages for the taking of an easement by the United States. United States v. Vir-
596 ginia Electric & Power Co., supra. The report of the commissioners shows that its conclusions were arrived at in the same manner. There was a sharp conflict in the evidence as to the amount of these damages. The commissioners' awards are well within the range of this conflicting testimony, and it is settled in this circuit that such findings shall be accepted unless clearly erroneous. Rapid Transit Co. v. United States, 10 Cir., 295 F. 2d 465; Buena Vista Homes, Inc.

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[4] A portion of the objections reads:

"2. The Reports wholly fail to make specific findings as to the facts on which the Commission based its valuation, and fail to show how they applied applicable principles of law to the facts in reaching their ultimate conclusions.

"3. The Reports wholly fail to show that all incompetent and inadmissible testimony was disregarded.

"4. The Reports wholly fail to show how controverted testimony was resolved, if it were, in arriving at the valuations, and are therefore deficient and inadequate.

"5. The Reports, taken as a whole amount to no more than a general verdict of a jury, since no specific findings of any controverted issues were made, the only specific findings being as to those matters which were stipulated to by the parties to this action. Therefore the Reports are wholly inadequate to furnish an adequate basis for review by the Trial Judge or an Appellate Court."

v. United States, 10 Cir., 281 F. 2d 476; United States v. Waymire, supra.[5]

"The primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive
597 and pertinent to the issues in the case so as to provide a basis for purposes of decision." Shapiro v. Rubens, 7 Cir., 166 F.2d 659, 665. See United States v. Tampa Bay Garden Apartments, Inc., 5 Cir., 294 F.2d 598; United States v. Pendergrast, 4 Cir., 241 F.2d 687; 5 Moore's Fed. Practice Par. 52.06 [1], at 2656 (2d Ed. 1951). The extent of exactness which is required in findings depends upon the nature of the matter involved. Kelley v. Everglades Drainage Dist., 319 U.S. 415. The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made.

We are satisfied that, considering the record as a whole, including all the evidence, our power to review the awards can be properly exercised, and that more specific findings would not be helpful. The situation might be different if there were numerous elements to be considered in arriving at just compensation, as there were in the cases

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[5] In United States v. Waymire, 10 Cir., 202 F. 2d 550, 553-4, the court said: "Upon review, it was the duty of the court to accept the awards of the commission unless they were clearly erroneous in whole or in part because based upon a substantial error in the proceedings, because based upon a misapplication of the controlling law, because unsupported by substantial evidence, or because contrary to the clear weight of all the evidence. And while it was incumbent upon the court to proceed with due regard for these general principles, if on the whole record the court was clearly convinced that in fixing just compensation for the property taken the commission acted arbitrarily and without proper regard for the evidence, or that the awards were unsupported by any substantial evidence, or that they were against the clear weight of all the evidence, it was the duty of the court to modify them, reject them in whole or in part, receive further evidence, or recommit the matter to the commission with instructions. . . ."

from the Fourth and Fifth Circuits which the
598 United States relies upon.[6] The issues in this case are not complicated, however, and the findings are entirely adequate to permit us to review them and conclude that they are not clearly erroneous.

599 The United States also asserts error arising out of the failure of the commission to grant its motion to strike the entire testimony of the landowners' expert witness, A. L. Willcox. While other grounds were asserted in its motion the United States now relies on only two of these:

(1) the consideration by Willcox of the managerial skill of individual landowners in appraising fair market value prior to the taking, and

(2) the impropriety of his testimony as to damages which were computed pursuant to a formula.

Willcox was employed by an insurance company as district manager in charge of making farm and ranch loans in the southwest part of the United States. He had been engaged in similar employment since about 1926, and his

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[6] In United States v. Cunningham, 4 Cir., 246 F. 2d 330, the land taken was a peninsula approximately 1 mile wide and 4 miles long, containing over 1850 acres. The property was largely undeveloped but was near a developed beach area and was suitable for development as a beach area for residential and commercial uses. There was testimony as to the value of the ocean front lots. It had value for sport fishing and hunting purposes. The value had been enhanced by the construction of a public highway across the peninsula and the creation of an artificial lake. Evidence of mineral value was offered.

The land involved in United States v. 2,477.79 Acres of Land, 5 Cir., 259 F. 2d 23, was taken in connection with the establishment of a dam and reservoir in the Brazos River Basin in Texas and the expansion of Fort Hood. Prior to the taking, the land was useful for farming and ranching. The building of the reservoir created a water front. One of the principal issues was the added value to the land caused by the creation of the lake. There was also a dispute as to the highest and best use of some of the tract.

In the Buhler case the lands taken involved extensive improvements, including a residence, swimming pools, an airfield with concrete runways, utility systems and 3500 feet of railroad track. A portion was used as an industrial warehouse area. There was also an area subdivided by paved roadways which was ideally suited for residential development. See United States v. 1146.32 Acres of Land, S.D. Tex., 20 F.R.D. 21. "The report contains no discussion specifically addressed to that parcel or to the various highest and best uses—airfield, warehouse, subdivision, farming—claimed for it." United States v. Buhler, 5 Cir., 254 F. 2d 876, 882.

duties included making appraisals and determining values of farm and ranch properties. He testified that he had appraised property in Washita County since 1935, and knew its value. He stated that he was familiar with the particular tracts involved in this proceeding and with the easement which the government took, and he fixed the values of the lands prior to the taking. An examination of the testimony concerning managerial skill reveals that Willcox was considering that managerial skill which had contributed to the future profitability of the property. Such evidence was admissible as a factor in determining the
600 value of the property taken by condemnation. Kimball Laundry Co. v. United States, supra.

It may be conceded, arguendo, that the formula utilized by Willcox in appraising the damage to the several tracts resulted in arbitrary damage assessments which were irrelevant in determining fair market value after the taking. Cf. United States v. Commodities Trading Corp., supra; United States v. Toronto, Hamilton & Buffalo Navigation Co., supra; United States v. Cors, supra. It is apparent from its conclusion that the proper measure of damages was the difference between fair market value prior to the taking and fair market value after the taking, that the commission did not consider the formula testimony in arriving at its awards. United States v. Delaware, L. & W. R.R., 3 Cir., 264 F.2d 112, cert. denied 361 U.S. 819; United States v. Hirsch, 2d Cir., 206 F.2d 289. The error, if any, was not prejudicial to the United States.

Affirmed.

601 IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Judgment—July 7, 1962

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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602 [Petition for Rehearing covering 47 pages filed August 21, 1962, omitted from this print. It was denied and nothing more by Order September 6, 1962.]

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603 IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Order Denying Appellant's Application for Rehearing En Banc—September 6, 1962

Thirty-Fourth Day, July Term, Thursday, September 6th, 1962.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the application of appellant for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is now here ordered that the said application be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Order Denying Appellant's Petition for Rehearing—September 6, 1962

Thirty-Fourth Day, July Term, Thursday, September 6th, 1962.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered that the said petition be and the same is hereby denied.

[On September 17, 1962, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.]

[On September 17, 1962, the original files in this cause were returned to the United States District Court for the Western District of Oklahoma.]

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604 **Clerk's Certificate**

[Omitted in printing]

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605 SUPREME COURT OF THE UNITED STATES

[Title omitted]

Order Extending Time to File Petition for Writ of Certiorari—December 3, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 4, 1963.

BYRON R. WHITE
Associate Justice of the Supreme Court of the United States.

606 SUPREME COURT OF THE UNITED STATES

No. 790, October Term, 1962

UNITED STATES, *Petitioner*,

v.

LOUIS T. MERZ, ET AL.

Order Allowing Certiorari—April 22, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963—692277/P.O. 1278

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS T. MERZ, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. A, *infra*) is reported at 306 F. 2d 39.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1962 (App. B, *infra*). A timely petition for rehearing *en banc* was denied on September 6, 1962. On December 3, 1962, Mr. Justice White extended the time to file a petition for a writ of certiorari to February 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the report of a commission awarding compensation in a condemnation case tried outside of the presence of the court, which does not show what facts were considered or what law was applied, precludes effective court review and therefore deprives the parties of the right to have just compensation judicially determined.

STATEMENT

This condemnation proceeding was instituted by the United States to obtain clearance easements[1] over several farms in connection with the Clinton-Sherman Air Force Base in Oklahoma. The easements were sloping and their elevation over the various farms ranged from 13 feet to 164 feet. A commission was appointed under Rule 71A(h), F.R. Civ. P., to determine the issue of compensation. The relevant facts may be summarized as follows:

The parties stipulated that the highest and best use of the land was for general agricultural purposes. While each landowner admitted that the easement would not prevent continued use of the land for that purpose, all except one stated that the value of his farm was reduced by one-half. Each also claimed his land had a mineral value which was impaired. Testimony concerning offers to buy was received over government objection.

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[1] Clearance, unlike avigation, easements do not involve flights. Clearance easements place a ceiling over land above which obstructions may not extend. See *United States* v. *Brondum*, 272 F. 2d 642, 643-647 (C.A. 5).

The landowners' valuation totalled $97,000. Their only appraiser-witness, Willcox, based his valuation testimony on the following formula of his own devising (R. 155–157):

$$\frac{\text{surface and building value}}{\text{value of 200' airspace per acre}} \times \text{value of airspace per foot} \times \text{feet affected} \times \text{acreage affected} = \text{amount of surface damage.}^{2}$$

Mineral value, arrived at by the capitalization of assumed bonuses and delay rentals, was then added to the formula-computed surface damage (R. 206). The resulting total was apparently adjusted to reflect the managerial skill of the individual farmer and Willcox testified further that the words "other materials" in the declarations of taking might prevent the use of usual farm machinery. Willcox' valuations totalled $117,927.18.

The government's experts rejected both Willcox' mineral capitalization process and also his surface-damage formula. They testified concerning the effect of these easements, giving valuations, based in part on comparable sales, totalling $16,950 and $18,350.

The commission awarded $49,442 in a report which contained little more than that ultimate conclusion (R. 38). The government objected to the adequacy of the original report, and an additional report was filed after a year's further consideration by the commission. The supplemental report merely recited undisputed facts and concluded with the bare state-

[2] Translated, the formula means that the land is damaged by 1/200 of its value for every foot of airspace taken below 200 feet. Willcox did not consider the airspace above 200 feet to be appreciably valuable for agricultural use.

ment of the rule that the awards should be the difference between the before and after values without, however, stating what those values were (R. 8). Without comment, the commission overruled the government's motion to strike Willcox's testimony.

In the district court and on appeal, the government contended that the reports were inadequate; and that Willcox's testimony, founded on a conjectural formula which was erroneously applied and influenced by the landowners' managerial skill, should have been excluded. The district court adopted the reports without discussion. The court of appeals likewise found the report was adequate for review, although it admitted that only "a general finding as to this amount [the amount of just compensation due] was made" (App. A, *infra*). While holding that the findings were not clearly erroneous, it did not indicate what evidence, whether the landowners' opinion or that of Willcox, justified the awards. It assumed that the commission did not consider the Willcox formula testimony in arriving at its awards (App. A, *infra*). The government's petition for rehearing *en banc*, calling attention to decisions of the Fourth and Ninth Circuits rendered after argument of the present case, was denied without an additional opinion.

REASONS FOR GRANTING THE WRIT

1. The question presented is important. It affects the procedure in thousands of federal condemnation cases in which the prospective awards total many millions of dollars. Trials now pending involve approximately 22,000 tracts, of which almost 5,300 are

in the Tenth Circuit. Unless corrected, the instant decision will govern condemnation proceedings tried by commission in the Tenth Circuit, and may well have an impact elsewhere.

As presented here, the question involves no mere formalistic quarrel. Requiring *some* content in commission reports may well have a substantial effect on the end result. It serves the same purpose as the rule enjoining trial judges to articulate their reasons for judgment in findings of fact and conclusions of law. See F.R. Civ. P., Rule 52(a). The lax procedure endorsed by the decision below, on the other hand, works a denial of due process of law in commission-tried condemnation cases. Failure to require detailed findings and articulated conclusions imposes an impossible burden on the parties and precludes any real review by the district judge, or by the appellate court.[a]

2. The decision below is in conflict with the rule of the Second, Third, Fourth, Fifth, and Ninth Circuits requiring condemnation commissions to file meaningful reports showing the facts found and the law ap-

[a] There is a basis for reviewing jury- and judge-tried condemnation cases. In jury-tried cases, the reviewing court has before it the trial judge's rulings on the issues as they develop in the case and the judge's instructions as the basis for testing the jury's general verdict. In cases tried by a judge without a jury, the reviewing court has findings and rulings. See *McCandless* v. *United States*, 298 U.S. 342, 345–348; *Clay and Quitman Counties* (App. C, *infra*); *United States* v. *Cunningham*, 246 F. 2d 330, 333 (C.A. 4); *Demetria Sifuentes* v. *United States*, 168 F. 2d 264, 266–268 (C.A. 1). Commission-tried cases cannot be effectively reviewed if the report does not show what facts were considered and what law was applied.

plied in reaching an award. *United States* v. *44.00 Acres in the Town of Greece (Odenbach)*, 234 F. 2d 410, 411, 414 (concurring opinion 416) (C.A. 2), certiorari denied, 352 U.S. 916; *United States* v. *Bobinski*, 244 F. 2d 299, 301–302 (C.A. 2); *United States* v. *Certain Parcels in Philadelphia (Merchants Exchange)*, 215 F. 2d 140, 142, 144–146 (C.A. 3); *United States* v. *Cunningham*, 246 F. 2d 330, 333 (C.A. 4); *United States* v. *Carroll*, 304 F. 2d 300, 304–306 (C.A. 4); *United States* v. *2,477.79 Acres in Bell County (Bowles)*, 259 F. 2d 23, 29 (C.A. 5); *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 406–409 (C.A. 5), certiorari denied, 366 U.S. 944; *United States* v. *Lewis*, 308 F. 2d 453, 455–456, 458–460 (C.A. 9); *United States* v. *2,872.88 Acres in Clay and Quitman Counties* (C.A. 5, Nos. 19344 and 19345, Dec. 5, 1962), not yet reported. The conflict is expressly acknowledged by the Court of Appeals for the Fifth Circuit in its *Clay and Quitman Counties* opinion, in which it says: "We recognize that the view we take of this matter is at variance with that of the Court of Appeals for the Tenth Circuit as expressed in the decision of that Court in *United States* v. *Merz*, 10 Cir., 306 F. 2d 39" (App. C, *infra*). We are advised the landowners intend to seek review of that decision on the ground of conflict with the present case.

These decisions cannot be distinguished away. Even if some of the cases involved more complicated facts, as the Tenth Circuit suggests (Appendix A, *infra*, n. 6), others did not. Thus, *Bobinski*, *Carroll*, *Lewis*, and *Clay and Quitman Counties*, all dealt

with ordinary farmland, as here. Nor is the difference between the courts merely one of degree. For, in the instant case, the court below was satisfied with a report which, beyond reciting certain stipulated facts, offered only a single conclusory figure as to each parcel, without the slightest indication what evidence was credited in reaching the result. The conflict between the circuits is plain. It can be resolved only by this Court.

3. The decision below is erroneous. We have already noted that the practice endorsed by the Tenth Circuit renders effective review impossible. When the factfinder reports only an ultimate conclusion without specifying the evidence considered and the weight accorded it, the review and appeal are "empty forms." *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 300, 302–305; *Carter* v. *Kubler*, 320 U.S. 243, 246–247; *United States* v. *Dillman*, 146 F. 2d 572, 574 (C.A. 5), certiorari denied, 325 U.S. 870.[4] The probabilities are that the cursory report filed here hides several errors committed by the commission, which, if brought to light, would require reversal.

Since the commission's estimation of the before and after values is not stated, it is not known whether the

[4] Related to the indispensability of subsidiary findings to the efficacious performance of judicial review in condemnation cases is this Court's insistence on such findings in reviewing decisions of administrative agencies and officers. *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94–95; *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 81; *United States* v. *Drum*, 368 U.S. 370 (concurring opinion 386); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167–169.

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awards are even within the range of the evidence.[5] Nor does the commission show the application of relevant valuation principles. The court of appeals, moreover, assumes that the commission did not rely on Willcox's mathematical formula, even though the commission had refused to strike his testimony.[6] That would leave the landowners' own valuations as the only basis for the award, and as *Clay and Quitman Counties* emphasized, it is important for the reviewing court to know whether the commission "gave credence to the opinions of witnesses who * * * had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case" (App. C, *infra*). The landowners here claimed a diminution in value of one-half, regardless of the varying elevation of the clearance easements above their farms. Did the commission agree? The landowners also admitted that the easements would

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[5] Although the end result, the remainder derived by subtracting "after value" from "before value," may be within the range, there is no way of telling whether the operatives actually used accord with the evidence.

[6] The award of odd-dollar amounts strongly suggests the commission's use of some mathematical process. Whether its process was Willcox's or a quotient-verdict type process or some other, we are not told and cannot know. See *United States v. 4,925 Acres in Grant Parish*, 143 F. 2d 127–128 (C.A. 5). By allowing the commission to remain silent, the court requires the parties, rather than the commission, to do what other courts have refused and, indeed, have found impossible to do on review—namely to demonstrate what did and what did not influence the commission.

not preclude continuation of their particular farming operations. How was this conflict resolved by the commission, if it was? Which view did the commission take, or did it accept both?

These further questions concerning the major conflicts in the evidence and the application of relevant valuation principles are not answered: What value did the commission assign to the mineral estates? If the commission's estimation exceeded the mineral value testimony, that would be plain error. Did the commission consider or use in some form Willcox' mathematical formula in determining just compensation? Reliance on the formula would be clear error, for the ascertainment of value is not a matter of formulas. *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402; *United States* v. *Cors*, 337 U.S. 325, 332; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U.S. 146, 156. Did the commission consider, as Willcox did, the managerial skill of the individuals operating these farms? If it did, that too would be error. Managerial skill is personal and subjective. It is not transferable in the market place and, under federal condemnation law, only objective elements and transferable values may be considered. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326; *United States* v. *Ham*, 187 F. 2d 265, 271 (C.A. 8). Did the commission consider the testimony of offers to buy as indexes of market value? Such testimony is inadmissible and may not be relied upon. *Sharp* v. *United*

States, 191 U.S. 341, 348–350. Was the commission's conclusion as to depreciation in value determined on a percentage basis applicable to all tracts, regardless of the varying heights of the clearance easements? If so, the error is patent.

Also, did the commission rely on any of the testimony relating to comparable sales? Since comparable sales generally furnish the most desirable basis for determining market value, it would be improper for the commission arbitrarily to ignore the evidence of such sales. *United States* v. *Miller*, 317 U.S. 369, 374–375; cf. *United States* v. *2,872.88 Acres in Clay and Quitman Counties* (C.A. 5, Nos. 19344 and 19345, Dec. 5, 1962), not yet reported. Did the commission capitalize assumed oil and gas bonuses and delay rentals? The witnesses disagreed on the propriety of using this method. In this case the method is speculative and, consequently, should not be used. *Olson* v. *United States*, 292 U.S. 246, 257; *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 407 (C.A. 5), certiorari denied, 366 U.S. 944. Did the commission assign any special meaning to the words "other materials" used in the declarations of taking? The commission received conflicting testimony on this point and stated during the hearing that it would "have to make a construction of this, and we have to show in our report how we construed this" (R. 233). The reports, however, are silent as to this, and we are left to speculate whether the commission agreed

with one witness' patently erroneous view that the easements condemned might prevent the use of usual farm machinery.

The court of appeals indicates that if *it* can find some competent evidence in the record to support the commission's result, the parties cannot demonstrate prejudicial error, even though the record contained incompetent evidence, admitted and never rejected by the commission (App. A, *infra*).[7] But it is not the function of the reviewing court to search the record, to analyze the evidence, and to supply findings which the factfinder has failed to make. *Kelley* v. *Everglades District*, 319 U.S. 415, 420–422. And even if that were the proper course, the court of appeals here does not disclose its own analysis. Surely the basis for the determination of just compensation guaranteed to landowners under the Fifth Amendment and the basis for the charge on the public treasury represented by the judgments should be revealed at some stage.

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[7] In fact, most of the condemnation cases which are reversed are reversed for errors of law appearing in the record, even though there is no dispute as to the awards being within the range of the admissible evidence. Cf. *McCandless* v. *United States*, 298 U.S. 342, 347–348; *United States* v. *2,872.88 Acres in Clay and Quitman Counties* (C.A. 5, Nos. 19344 and 19345, Dec. 5, 1962), not yet reported (App. C, *infra*); *United States* v. *Dillman*, 146 F. 2d 572, 573–575 (C.A. 5), certiorari denied, 325 U.S. 870. And in a great many cases the question is whether evidence, admissible for a limited purpose, has been misused. Cf. *United States* v. *Cunningham*, 246 F. 2d 330, 333–334 (C.A. 4).

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

FEBRUARY 1963.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 6772, June Term, 1962

Filed, United States Court of Appeals, Tenth Circuit, July 7, 1962

UNITED STATES OF AMERICA, APPELLANT

vs.

LOUIS T. MERZ, LEO J. MERZ, MINARD HENDERSON AND GRACE HENDERSON; W. E. GUTHRIE, BERNICE GUTHRIE AND FEDERAL LAND BANK OF WICHITA, WICHITA, KANSAS; JOHN KERKOFF AND KATHERINE H. KERKOFF; ROBERT E. DAVIS AND MAMIE DAVIS; E. E. SMITH AND PEARL T. SMITH; BERTHA KINNEY ROGERS, JAUNITA KINNEY NAGEL AND WANDA KINNEY RIGGINS; CHARLIE O. RIVERS AND MYRTLE RIVERS, EARL LEVERTON, NETTIE E. BRYAN, L. T. ARMSTRONG, WAYNE ARMSTRONG, MARY INDIANA ARMSTRONG, A/K/A MARY I. ARMSTRONG, A/K/A MRS. T. H. ARMSTRONG, FAY KLIEWER; AND ELLA B. HOOVER AND FEDERAL LAND BANK OF WICHITA, WICHITA, KANSAS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Raymond N. Zagone, Dept. of Justice, Washington, D.C. (Ramsey Clark, Assistant Attorney General, Washington, D.C., B. Andrew Potter, U.S. Attorney, Oklahoma City, Oklahoma, and Roger P. Mar-

quis, Dept. of Justice, Washington, D.C., on the brief), for Appellant.

Denver W. Meacham of the firm of Meacham, Meacham & Meacham, Clinton, Oklahoma, (Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, William J. Holloway, Jr., and Paul R. McDaniel, all of Oklahoma City, Oklahoma, with him on the brief), for Appellees.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

This is a proceeding by the United States to obtain by condemnation clearance easements[1] over neighbor-

[1] The easements taken were described as:

"(1) The continuing perpetual right to top, to cut to ground level, to remove, and to prohibit the growth of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon, extending into, extending above, or which could in the future infringe upon, extend into, or extend above the Glide Angle Plane and/or Transitional Surface as described in Schedule '2'.

"(2) The continuing perpetual right to remove, to raze, to destroy, and to prohibit the future construction of buildings or portions thereof, other structures or portions thereof, land, embankments of earth and other materials infringing upon, extending into, extending above the Glide Angle Plane and/or Transitional Surface as described in Schedule 'Z'.

"(3) The right to ingress to, egress from, and passage on the lands described in Schedule 'A' for the purpose of exercising the rights hereby taken for said public uses. Reserving, however, to the landowners, their heirs, executors, administrators, successors, and assigns, all rights, titles, interests and privileges as may be exercised and enjoyed without interference with or abridgment of the rights hereby taken for said public uses."

Schedule "Z" described runway approach zones extending laterally and longitudinally from the existing runways. The Glide Angle Plane was defined as:

ing lands for use as airplane approaches to Clinton-Sherman Air Force Base in Washita County, Oklahoma. The right to acquire the easements is not disputed. The district court referred the question of adequate compensation to a commission. This is an appeal from a judgment approving and confirming the commission's awards of compensation to be paid to the owners of the tracts of land affected by the taking.

Rule 71A(h), Fed. R. Civ. P., authorizes the district court to appoint a commission of three to determine the issue of compensation to be paid by the United States in land condemnation cases. The commission has the powers of a master as provided for in Rule 53(c), Fed. R. Civ. P., and the proceedings are governed by paragraphs (I) and (II) of subdivision (d) thereof. The report and findings of the commission shall have the effect, and be dealt with by the court in accordance with the practice, set forth in Rule 53(e) (II). United States v. Waymire, 10 Cir., 202 F. 2d 550. The court's order of reference did not require findings of fact and conclusions of law, and it limited the commission's duties to determining the amount of damages to be paid to the landowners.

Just compensation means the full equivalent in money for the property taken. United States v. Miller, 317 U.S. 396. Since the taking of the property by eminent domain is not a voluntary transfer the determination of just compensation is an in-

"The glide angle plane is a trapezoidal plane extending over the runway approach zone starting at an elevation equivalent to the center line elevation at the end of the runway and sloping upward from the narrower end at a rate of 1 foot vertically for each 50 feet horizontally."

674250—63——3

formed guess or estimate based upon the best available criteria of value. Kimball Laundry Co. v. United States, 338 U.S. 1, 7 A.L.R. 2d 1281. Usually it is described as the fair market value of the property when taken. United States v. Silver Queen Mining Co., 10 Cir., 285 F. 2d 506. The determination, however, cannot be reduced to a rigid and fixed rule or formula. United States v. Commodities Trading Corp., 339 U.S. 121; United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396; United States v. Cors, 337 U.S. 325. "The guiding principle . . . is reimbursement to the owner for the property interest taken." United States v. Virginia Electric & Power Co., 365 U.S. 624.

It was stipulated that the highest and best use of the eight tracts of land involved on this appeal was for general agricultural purposes. There was no evidence that the land had any other value except for minerals. The owners of the different tracts testified as to the value of their lands and the amount of damages which the easements caused to them. Appraisers for the United States determined the values, including the mineral values, of the tracts to be substantially less than that fixed by the respective landowners, and their opinions as to damages were comparably smaller. In addition, an appraiser, A. L. Willcox, testified on behalf of the landowners, and, using a formula of his own development, he arrived at an opinion as to the damages to the land by equating the taking of the air space above it to the taking of an undivided portion of the surface.[2] The appli-

[2] The formula used by Willcox assumed that no damage to the surface would result from the taking of air space above an altitude of 200 feet. It also assumed an absolute taking if the air space taken reached ground level. Under the formula damages were computed as ½ of 1% of the value of the

cation of this formula resulted in damages substantially higher than those arrived at by the landowners or the appraisers for the United States.

The commission, after viewing the premises, filed a report which cited the order of reference, and contained ultimate findings as to the amount of compensation to be paid to each landowner. The United States objected to the adequacy of this report, but made no request for specific findings. Thereafter an additional and supplemental report, which included findings of fact, was filed.[3] In objecting to this report, the United States alleged that the commission had failed to make specific findings as to the facts upon which the valuation was based, and further that the report wholly failed to show how conflicting evidence was resolved.[4]

---

surface for each foot of the average air space taken below 200 feet. This average was computed as 200 minus one-half of the sum of the altitudes of the Glide Angle Plane as it passed over the opposite boundaries of each tract. He valued the minerals separately, and considered them as taken completely if the average altitude of the Glide Angle Plane was lower than the height of an average oil drilling rig.

[3] This subsequent report made findings as to the height of the clearance easement over each tract, together with a finding that the highest and best use of the land was for agricultural purposes, and concluded that: "The amount of just compensation for each landowner involved is the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking, being the demunition (sic) of said fair cash market value caused solely and directly by the taking; . . ."

[4] A portion of the objections reads:

"2. The Reports wholly fail to make specific findings as to the facts on which the commission based its valuation, and fail to show how they applied applicable principles of law to the facts in reaching their ultimate conclusions.

Relying on United States v. 2,477.79 Acres of Land, 5 Cir., 259 F. 2d 23; United States v. Buhler, 5 Cir., 254 F. 2d 876; and United States v. Cunningham, 4 Cir., 246 F. 2d 330, it contends that the findings are inadequate for a proper review of the proceedings and that the case should be remanded for more adequate findings.

The parties were in agreement as to the type of land over which the easements were taken, and its highest and most profitable use. Generally, the witnesses arrived at their estimates of damages to the land by determining the difference between the market value before the taking of the easement and the market value thereafter. This is the normal method of valuing damages for the taking of an easement by the United States. United States v. Virginia Electric & Power Co., supra. The report of the commissioners shows that its conclusions were arrived at in the same manner. There was a sharp conflict in the evidence as to the amount of these damages. The commissioners' awards are well within the range of this conflicting testimony, and it is settled in this circuit that such findings shall be accepted unless clearly erroneous. Rapid Transit Co. v. United States, 10 Cir., 295 F. 2d 465; Buena Vista Homes,

---

"3. The Reports wholly fail to show that all incompetent and inadmissible testimony was disregarded.

"4. The Reports wholly fail to show how controverted testimony was resolved, if it were, in arriving at the valuations, and are therefore deficient and inadequate.

"5. The Reports taken as a whole amount to no more than a general verdict of a jury, since no specific findings of any controverted issues were made, the only specific findings being as to those matters which were stipulated to by the parties to this action. Therefore the Reports are wholly inadequate to furnish an adequate basis for review by the Trial Judge or an Appellate Court."

Inc. v. United States, 10 Cir., 281 F. 2d 476; United States v. Waymire, supra.[5]

"The primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision." Shapiro v. Rubens, 7 Cir., 166 F. 2d 659, 665. See United States v. Tampa Bay Garden Apartments, Inc., 5 Cir., 294 F. 2d 598; United States v. Pendergrast, 4 Cir., 241 F. 2d 687; 5 Moore's Fed. Practice Par. 52.06[1], at 2656 (2d Ed. 1951). The extent of exactness which is required in findings depends upon the nature of the matter involved. Kelley v. Everglades Drainage Dist., 319 U.S. 415. The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made.

We are satisfied that, considering the record as a whole, including all the evidence, our power to review

---

[5] In United States v. Waymire, 10 Cir., 202 F. 2d 550, 553–4, the court said:

"Upon review, it was the duty of the court to accept the awards of the commission unless they were clearly erroneous in whole or in part because based upon a substantial error in the proceedings, because based upon a misapplication of the controlling law, because unsupported by substantial evidence, or because contrary to the clear weight of all the evidence. And while it was incumbent upon the court to proceed with due regard for these general principles, if on the whole record the court was clearly convinced that in fixing just compensation for the property taken the commission acted arbitrarily and without proper regard for the evidence, or that the awards were unsupported by any substantial evidence, or that they were against the clear weight of all the evidence, it was the duty of the court to modify them, reject them in whole or in part, receive further evidence, or recommit the matter to the commission with instructions. * * *"

the awards can be properly exercised, and that more specific findings would not be helpful. The situation might be different if there were numerous elements to be considered in arriving at just compensation, as there were in the cases from the Fourth and Fifth Circuits which the United States relies upon.* United States v. Tampa Bay Garden Apartments, Inc., supra. The issues in this case are not complicated, however, and the findings are entirely adequate to permit us

---

*In United States v. Cunningham, 4 Cir., 246 F. 2d 330, the land taken was a peninsula approximately 1 mile wide and 4 miles long, containing over 1,850 acres. The property was largely undeveloped but was near a developed beach area and was suitable for development as a beach area for residential and commercial uses. There was testimony as to the value of the ocean front lots. It had value for sport fishing and hunting purposes. The value had been enhanced by the construction of a public highway across the peninsula and the creation of an artificial lake. Evidence of mineral value was offered.

The land involved in United States v. 2,477.79 Acres of Land, 5 Cir., 259 F. 2d 23, was taken in connection with the establishment of a dam and reservoir in the Brazos River Basin in Texas and the expansion of Fort Hood. Prior to the taking, the land was useful for farming and ranching. The building of the reservoir created a water front. One of the principal issues was the added value to the land caused by the creation of the lake. There was also a dispute as to the highest and best use of some of the tract.

In the Buhler case the lands taken involved extensive improvements, including a residence, swimming pools, an airfield with concrete runways, utility systems and 3,500 feet of railroad track. A portion was used as an industrial warehouse area. There was also an area subdivided by paved roadways which was ideally suited for residential development. See United States v. 1,146.32 Acres of Land, S.D. Tex., 20 F.R.D. 21. "The report contains no discussion specifically addressed to that parcel or to the various highest and best uses—airfield, warehouse, subdivision, farming—claimed for it." United States v. Buhler, 5 Cir., 254 F. 2d 876, 882.

to review them and conclude that they are not clearly erroneous.

The United States also asserts error arising out of the failure of the commission to grant its motion to strike the entire testimony of the landowners' expert witness, A. L. Willcox. While other grounds were asserted in its motion the United States now relies on only two of these:

> (1) the consideration by Willcox of the managerial skill of individual landowners in appraising fair market value prior to the taking, and
>
> (2) the impropriety of his testimony as to damages which were computed pursuant to a formula.

Willcox was employed by an insurance company as district manager in charge of making farm and ranch loans in the southwest part of the United States. He had been engaged in similar employment since about 1926, and his duties included making appraisals and determining values of farm and ranch properties. He testified that he had appraised property in Washita County since 1935, and knew its value. He stated that he was familiar with the particular tracts involved in this proceeding and with the easement which the government took, and he fixed the values of the lands prior to the taking. An examination of the testimony concerning managerial skill reveals that Willcox was considering that managerial skill which had contributed to the future profitability of the property. Such evidence was admissible as a factor in determining the value of the property taken by condemnation. Kimball Laundry Co. v. United States, supra.

It may be conceded, arguendo, that the formula utilized by Willcox in appraising the damage to the several tracts resulted in arbitrary damage assessments which were irrelevant in determining fair market

value after the taking. Cf. United States v. Commodities Trading Corp., supra; United States v. Toronto, Hamilton & Buffalo Navigation Co., supra; United States v. Cors, supra. It is apparent from its conclusion that the proper measure of damages was the difference between fair market value prior to the taking and fair market value after the taking, that the commission did not consider the formula testimony in arriving at its awards. United States v. Delaware, L. & W. R.R., 3 Cir., 264 F. 2d 112, cert. denied 361 U.S. 819; United States v. Hirsch, 2d Cir., 206 F. 2d 289. The error, if any, was not prejudicial to the United States.

AFFIRMED.

APPENDIX B

JUDGMENT

Seventeenth Day, June Term, Saturday, July 7th, 1962

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 19344

UNITED STATES OF AMERICA, APPELLANT

versus

2,872.88 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY AND QUITMAN COUNTIES, STATE OF GEORGIA, AND FRANK HUMBER, ET AL., AND UNKNOWN OWNERS, APPELLEES

and

No. 19345

UNITED STATES OF AMERICA, APPELLANT

versus

1,361.09 ACRES OF LAND, MORE OR LESS, SITUATE IN CLAY COUNTY, STATE OF GEORGIA, AND CAROLYN GAVIN GIBSON, ET AL., AND UNKNOWN OTHERS, APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF GEORGIA

(December 5, 1962)

HUGH NUGENT, Attorney, Department of Justice [with him on the brief were Assistant Attorney General RAMSEY CLARK; United States Attorney FLOYD M. BUFORD; Assistant United States Attorney TRUETT SMITH; and ROGER P. MARQUIS, Attorney, Department of Justice], for appellant.

BENTLEY CHAMPION, of Kelly, Champion & Henson [with him on the brief were STONE & STONE and JESSE G. BOWLES], for appellees.

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and JOHNSON, District Judge.

TUTTLE, Chief Judge: These appeals by the United States from District Court judgments approving valuation awards of condemnation commissioners present the question whether the reports of the commissioners were sufficiently detailed as to findings of fact, and in giving the basis on which they were bottomed to permit adequate review by the district court, and thereafter by this Court.

These condemnation suits are a part of a program of land acquisition for the Walter F. George Lock and Dam project on the Chattahoochee River in Georgia and Alabama. The three series of tracts involved are all tracts of ordinary farm, timber and pasture land. While the government requested a jury trial, it does not now contend that the submission of the issues to commissioners by the trial court constituted reversible error. Neither does the government, on the record before us, assign any specific error in the hearings before the commissioners as a basis for attacking the judgment of the district court in affirming the report of the commissioners. Instead, the government takes the position that the reports of the commissioners are in such general and vague terms as to make it impossible for the district court or for this Court on appeal to determine whether the commissioners' ultimate conclusions of value were based on legally correct principles or on legally sufficient evidence.

The appellees here, first, claim that the Court of Appeals cannot take notice of the government's ap-

peal, because it does not expressly contend that the awards are excessive. They take the position, therefore, that any claim by the government that there was error in the form or substance of the commissioners' reports falls within the "harmless error" rule of the Federal Rules of Civil Procedure, Rule 61 F.R.C.P. We think this contention is without merit. It is apparent from the findings of the commissioners that the awards made by them and approved by the trial court are substantially in excess of the amounts deposited in court upon the declaration of taking. It thus appears that if errors occurred in the proceedings below, as a result of which judgments were awarded in excess of the amounts contended for by the United States, such errors would not be harmless in the sense of the Rule.

In general, the report of the commissioners recited the substance of the valuation testimony given by the several witnesses tendered by the landowners, on the one hand, and by the government on the other, and they made ultimate findings of the market value of the property taken and of severance damages to lands not taken and make certain specific findings as to the value of easements and fences taken, or the cost of fencing the remaining tracts. The reports did not in any manner whatever indicate which evidence the commission credited and which evidence it discredited. The reports gave no indication as to the degree to which it based its findings upon those opinions that were based on knowledge of comparable sales, nor did they give any indication as to whether indicated sales were truly comparable. The reports did not indicate to what extent it gave credence to the opinions of witnesses who, according to the summary of evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally

considered by the courts to be required to support an opinion of value in a condemnation case.

Part of the basis for this Court's repeatedly stating that the trial of condemnation valuation issues is typically for a jury, and the appointment of commissioners is proper only in the exceptional case, *United States* v. *Buhler*, 5 Cir., 254 F. 2d 876, *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 408, *United States* v. *Buhler*, 5 Cir., 305 F. 2d 319, 331, is that where a trial is had before a jury, the trial judge is charged with the responsibility of determining the qualifications of so-called expert witnesses and of others who undertake to express opinions as to land values and to determine initially whether so-called "comparable sales," about which witnesses propose to testify, are sufficiently comparable to justify their consideration by the fact-finder, and because, further, the trial judge is able, by correctly charging the jury, to point out the defects and weaknesses in the testimony of interested parties to the proceedings, such as the owners of the land involved, and to stress the importance, as courts have always done, *Baetjer* v. *United States*, 1 Cir., 143 F. 2d 391, 397; *International Paper Co.* v. *United States*, 5 Cir., 227 F. 2d 201, 208; *United States* v. *Leavell & Ponder, Inc.*, 5 Cir., 286 F. 2d 398, 407, cert. denied 366 U.S. 944, of opinion evidence based on comparable transactions. In a trial to a jury under such supervision by a trial judge, it can well be understood why a general verdict of value, plus a general verdict of severance damages can suffice, whereas a hearing before a commission must result in findings much more detailed than a general verdict.

The Courts of Appeals of the several circuits are not of a uniform mind as to this, but we find ourselves

fully in accord with the reasoning of the Court of Appeals for the Fourth Circuit in *United States* v. *Cunningham*, 4 Cir., 246 F. 2d 330, 333, where it is said:

> The very reasons which justify the appointment of the commission, however, demonstrates the inadequacy of the commission's report. The justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation and the importance of having these adequately set forth in a report so that they may be subjected to the scrutiny of the District Court and of this court upon review and the proper principles of valuation applied to them. Any adequate review of the facts or of the legal principles followed in basing valuations on the facts is defeated if a report by the commission is of such a character that it amounts to no more than a general verdict by a jury. The verdict of a jury of twelve men may reasonably be dispensed with if commissioners make a report which furnishes an adequate basis of review by the trial judge and the appellate court, but not if the report furnishes no such basis. Just as a judge in a trial without a jury is required to make adequate findings so that his conclusions may be reviewed by the appellate court so a master, in an action to be tried without a jury, is required to make findings of fact so that his conclusions may be adequately reviewed by the trial judge, who is required to accept them 'unless clearly erroneous' (Rule 53(e)(2)), and this practice with respect to the report of a master is prescribed by Rule 71A(h) with respect to reports of commissioners in condemnation proceedings.

This Court has expressly approved this language of the Fourth Circuit in *United States* v. *2,477.79*

Acres of Land in Bell County, 5 Cir., 259 F. 2d 23, where on page 29, we said:

> We find ourselves in agreement with the Government's position that the findings of the commissioners are wholly inadequate and that the judgment must be vacated and the cause remanded for proper findings and a judgment based thereon. From the report, so styled, of the commissioners nothing appears except a recital of their appointment, a statement that a hearing was had, and the commissioners' conclusions as to values. As examples of the deficiencies in the findings it may be noted that *nothing is found as to how the commissioners resolved the conflicts in the testimony*, no findings appear as to the uses of the land particularly Tract 805, and no determination is made as to benefits. Without explicit findings the trial court cannot adopt or reject the findings or adopt some and reject others. Without adequate findings this Court does not have before it a record which permits of a review of the district court's adjudication. United States v. Buhler, supra; United States v. Cunningham, 4 Cir., 1957, 246 F. 2d 330. [Emphasis added.]

We recognize that the view we take of this matter is at variance with that of the Court of Appeals for the Tenth Circuit as expressed in the decision of that Court in *United States* v. *Merz*, 10 Cir., 306 F. 2d 39. Our view in this respect is in accord with that of the Court of Appeals for the Ninth Circuit, which has recently reversed judgment of a trial court in California which expressly stated that in a condemnation case, the Commission's finding "may be as general as the verdict of a jury, and have the same effect." In its judgment reversing this decision the Court of Ap-

peals in *United States* v. *Lewis*, 9 Cir., No. 17,437, dec. July 10, F. 2d , said:

> Upon this basic difference we agree with the principles expressed in Cunningham. The district judge is not sitting as the presiding judge in a jury-tried case, but as a reviewing court. He has not heard the evidence nor supervised its admission and thus is in no position to view the commission's report simply as a jury verdict. If the court is intelligently to perform a function of review, it must be able to ascertain whether, in arriving at its value judgment, error was committed by the commission, either in the resolution of factual disputes or in the application of principles of valuation. There must be a sufficient disclosure to the reviewing court to enable it to understand what it is that has been decided. As stated by Mr. Justice Cardozo in United States v. Chicago M., St. P. & P. Railroad, 1935, 294 U.S. 499, 510–511:
>
> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Although admittedly the scope of review, either by the trial court of the commissioner's findings of valuation or by this Court on the trial court's judgment, is restricted in the sense that a reversal is to be had only if the order under review is clearly erroneous, this function cannot be adequately performed by the reviewing court unless the fact finder makes it plain what the basis of its decision was. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient findings of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based. It is too obvious to require argument that in determining mar-

ket value the best test is what the same or similar property is selling for in the locality at or near the day of taking. Thus, it is universally recognized that the best test of market value is the data concerning comparable sales. On the record before us, the commission speaks of comparable sales, but there is no finding or expression of opinion as to whether the sales sustain a value of $100 per acre, for instance, in the case of one of the tracts, as found by the commission, or whether this value represents merely a scaling down by the commission of an expression of an opinion by others whose opinion of value may have been based on some such theory as that expressed by one of the witnesses, who said:

> I arrived at it like I'd price mine, just like it is; that's what it would take to buy mine adjoining Hoke's.

If this is all that the record shows as to this neighbor's qualifications to express an opinion of value of the land, then such opinion would obviously have no probative value.

This Court has held that in an appeal from a judgment of the trial court where the valuation finding has been made by commissioners, it is the function of the trial court to determine whether the commission's findings are to be approved or are to be reversed under the clearly erroneous standard. *United States* v. *Twin City Power Company of Georgia,* 5 Cir., 253 F. 2d 197, 204. It is then the function of this Court to determine whether the district court's disposition of the commission's findings was clearly erroneous.

In order that the district court may perform its function, it must be able to determine whether the commission adopted the correct legal principles, and

whether the evidence before the commission met the standard of substantiality to withstand a reversal by the district court. As we said in *United States* v. *Leavell & Ponder, Inc.*, 5 Cir. 286 F. 2d 398, at page 406, "The figure arrived at by the commissioners would much better have been supported by subsidiary findings of fact. . . . Without adequate subsidiary findings it is impossible for this Court to test the correctness of the elements of which it is the product or the sum."

Furthermore, while we do not even suggest the need for long findings or long reports merely for the sake of length, there is much to be said for the view that commissioners like trial judges may be expected to give more careful consideration to the subsidiary facts and the legal principles involved if they are required to be stated in the report. The language of the opinion of the Court of Appeals for the Second Circuit, in *United States* v. *Forness*, 2 Cir., 125 F. 2d 928, at page 942 is here apposite:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

In order that the commissioners' reports may meet the standards here prescribed, the judgments are REVERSED and the cases are REMANDED to the trial court for resubmission.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 63

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS T. MERZ, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

DENVER W. MEACHAM,
P. O. Box 681,
Clinton, Oklahoma;

WILLIAM J. HOLLOWAY, JR.,
PAUL R. McDANIEL,
570 First National Building,
Oklahoma City, Oklahoma,

Counsel for Respondents.

April, 1963.

UTTERBACK TYPESETTING CO., 12 So. Walker, Oklahoma City, Ph. CE 2-8710

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 790

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS T. MERZ, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not prepare an opinion. The opinion of the Court of Appeals is reported at 306 F.2d 39.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED

Whether the findings and reports of the Commission, appointed under Rule 71A(h) to determine just compensation, were sufficient in detail when they itemized the farm tracts involved, interests taken, the highest and best use

(specifically rejecting claimed special uses), correctly stated the measure of just compensation (the difference in fair cash market value immediately before and after the taking), specifically excluded any consideration of use of the space included in the clearance easements by aircraft or otherwise, and showed that the tracts were personally viewed by the Commission.

STATEMENT

This condemnation litigation commenced March 8, 1956, when the United States filed its complaint to take clearance easements over several farms, and one tract in fee, in Washita County, Oklahoma. The clearance easements were taken in connection with Clinton-Sherman Air Force Base runways, varying from 13 feet to 164 feet in elevation (R. 48-49).

The interests taken granted the Government the perpetual right to top, cut to ground level, remove and prohibit trees, bushes, shrubs or any other growth or undergrowth extending above described planes, and the continuing perpetual right to remove, raze, destroy and prohibit construction of buildings, other structures and embankments, together with the right of ingress and egress to exercise such rights (R. 3-4). A more severe clearance easement as to one tract and a fee simple taking were included in an Amendment To Complaint and Declaration Of Taking No. 2, filed March 4, 1957 (R. 23-32). The District Court ordered the issue of just compensation to be heard by a Commission (R. 37-38).

The single issue raised by the Government's Petition to this Court is the sufficiency of details in the reports of the Commission. All other contentions have been discarded by the Government, including the one additional point presented to the Court of Appeals concerning admissibility of the testimony of Mr. Willcox. Neither in that Court nor here is there any complaint as to the sufficiency of the evidence to support the awards of just compensation or any suggestion that the awards were excessive. It is, therefore, necessary to examine the "Report of Commissioners" and "Additional Report of Commissioners" (R. 38-46, 48-52). The sufficiency of their details is all that remains of this controversy which has been in litigation for over seven years.

The findings and reports described separately all the tracts involved (R. 39-45), stated the clearance easements taken as to each tract-varying from 13 to 164 feet in elevation (R. 38-49), found the ownership of the tracts and the nature of the interests owned in them by the parties (R. 49-50), and found in the Additional Report that the highest and best use of all the land involved is for general agricultural purposes (R. 50).

The reports further stated the measure of compensation awarded for each land owner—"the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking, bein gthe demunition (*sic*) of said fair cash market value caused solely and directly by the taking . . ." (R. 50), and rejected any consideration of use of the area included in the

clearance easements, such as by airplanes or otherwise (R. 51). It was found as to Tract A-142 that the proof was speculative and inadequate to show any value of the land as a sand pit (R. 45-46). The reports stated that the motion to strike all the testimony of Mr. Willcox was overruled,[1] and the motion to strike the testimony of Mr. Davis was sustained (R. 51). It was also reported that the lands in question were viewed by the Commission (R. 39).

The District Court had appointed the Commission on the grounds provided in Rule 71A(h) of the Rules of Civil Procedure. The Government made no request for specific findings, and the Order appointing the Commission required no special findings of facts and conclusions of law (R. 37-38). Objections were filed to the sufficiency of the original report by the Government, not calling, however, for the numerous details now magnified in the Petition (R. 46-47). The "Additional Report of Commissioners" stated findings of fact and conclusions of law (R. 48-52). After this final report, the Government filed more extended objections (R. 52-55). The District Court rejected these contentions as to form, and adopted the reports by its judgment (R. 57-74).

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[1] The motion to strike all the testimony of Mr. Willcox was untenable. He was qualified to state his opinion on diminution in fair cash market value by reason of appraisal experience in the mortgage loan business since 1934 (R. 152-153). His opinion on such diminution in value was competent in any event (R. 153-154; 157-158; 160-163). The Government's only motion was to strike *all* his testimony (R. 275-278). Since at least a substantial part of such evidence was competent, the motion to strike all was properly overruled. *United States* v. *Bechtold Co.*, 129 F.2d 473, 480 (8th Cir., 1942); *Arizona Power Corp.* v. *Smith*, 119 F.2d 888, 891 (9th Cir., 1941); see also *Summit Drilling Corp.* v. *Commissioner*, 160 F.2d 703, 706 (10th Cir., 1947).

The Court of Appeals also considered the objections as to the form of the reports. It sustained the reports as showing the adoption of the proper method of determining just compensation, and stated that the awards were "well within the range of this conflicting testimony." 306 F.2d at 42. It pointed out that the evidence presented to the Commission was properly directed solely to the diminution in value of the lands after the taking, and that there were not numerous elements to consider as to just compensation. It concluded:

> "We are satisfied that, considering the record as a whole, including all the evidence, our power to review the awards can be properly exercised, and that more specific findings would not be helpful. The situation might be different if there were numerous elements to be considered in arriving at just compensation, as there were in the cases from the Fourth and Fifth Circuits which the United States relies upon. The issues in this case are not complicated, however, and the findings are entirely adequate to permit us to review them and conclude that they are not clearly erroneous." 306 F.2d at 42-43.

ARGUMENT

The Petition's casting of the question presented is not warranted by the opinion of the Court of Appeals and this record, we submit.[2] The opinion cannot be viewed as sanc-

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[2] The Petition phrased the question presented as follows:

> "Whether the report of a commission awarding compensation in a condemnation case tried outside of the presence of the court, which does not show what facts were considered or what law was applied, precludes effective court review and therefore deprives the parties of the right to have just compensation judicially determined."

tioning any departure from the requirement of sufficiently comprehensive findings and reports, which it recognizes as follows:

> "'The primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision.' Shapiro v. Rubens, 7 Cir., 166 F. 2d 659, 665. See United States v. Tampa Bay Garden Apartments, Inc., 5 Cir., 294 F. 2d 598; United States v. Pendergrast, 4 Cir., 241 F. 2d 687; 5 Moore's Fed. Practice Par. 52.06 [1] at 2656 (2d Ed. 1951). The extent of exactness which is required in findings depends upon the nature of the matter involved. Kelley v. Everglades Drainage Dist., 319 U. S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485. The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made." 306 F.2d at 42.

Therefore, only a question of *degree* of details is involved. In these particular circumstances, did the Court of Appeals err in holding—as the District Court held—that their review functions could properly be performed with these reports? There is no error and the decision poses no conflict with opinions of this Court, no such conflict with those of other Circuits as to call for review here, and no question of importance appropriate for settlement by this Court.

1. There is no error and the opinion below is not in conflict with decisions of this Court. The opinion of the Court of Appeals recognizes that the findings must be "sufficiently comprehensive and pertinent to the issues" to form

the basis for the decision. 306 F.2d at 42. It holds only that their specificity is sufficient on this record. These reports described the tracts (R. 39-45), the clearance easements taken (R. 38-49), the interests owned by the parties (R. 49-50), and found the highest and best use of the land as agricultural (R. 50). Improper elements were expressly rejected, such as use by aircraft or otherwise of the area in the easements (R. 51). Inadequate and speculative proof of the value of some of the land as a sand pit was specifically disregarded (R. 45-46). Damages found were confined to diminution of fair cash market caused solely and directly by the taking (R. 50). The basis for the decision was made clear.

On this record, the opinion below cannot fairly be read as endorsing any "lax procedure," as claimed by the Petition. In such circumstances, it was rightly held that the findings were adequate. Morever, the rule expressed in the opinion is correct, properly sustaining the requirement that findings be "sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision . . ." *Shapiro* v. *Rubens*, 166 F.2d 659, 665 (7th Cir., 1948); *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 126 F.2d 992, 996 (2d Cir., 1942); *United States* v. *Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 606 (5th Cir., 1961).

The extensive itemization now sought is not required in such findings. It is first contended that there is no indication of "what evidence was credited in reaching the result," followed by several similar inquiries relied on (Petition, pp. 7-10). Findings under Rule 52(a), bound by the

same requirement, are not obliged to include "a detailed itemization of the proof relied upon in order to reach the result." *United States* v. *Lewis*, 308 F.2d 453, 460 (9th Cir., 1962). They need not contain "detailed evidentiary findings . . ." *Carr* v. *Yokohama Specie Bank, Limited*, 200 F.2d 251, 255 (9th Cir., 1952); *Elam* v. *United States*, 250 F.2d 582, 583 (6th Cir., 1958), *cert. denied*, 358 U.S. 848 (1958); *Lowe's* v. *Lieberman*, 78 F. Supp. 201, 216 (D. Mass., 1948). The Petition now questions whether the Commission properly disposed of several details, stressed here for the first time. However, findings need not be made "on all the facts presented," *Klimkiewicz* v. *Westminster Deposit & Trust Co.*, 122 F.2d 957, 958 (D.C. Cir., 1941), *cert. denied*, 315 U.S. 805 (1942); nor are they inadequate where they do not discuss all contentions of the parties. *Schilling, et al.* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir., 1944). A terse answer to the Petitioner's quarrel with the findings was stated by JUDGE LEARNED HAND:

> "Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law." *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, 126 F.2d 992, 996 (2d Cir., 1942).

There is no conflict shown with applicable decisions of this Court. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 (1937), cited at page 7 of the Petition, only held that it was error to base conclusions on unidentified matters not of record, and on matters improperly given

judicial notice. *Carter* v. *Kubler*, 320 U.S. 243 (1943), decided only that a commissioner's unannounced independent investigation could not serve as the basis for his determinations under Bankruptcy Act procedure. In the instant case, there is no argument that matters not of record were considered, and all contentions as to admissibility of evidence have been abandoned.

The Government does maintain that if improper evidence is disregarded, only the landowners' valuations would support the awards. This ignores Mr. Willcox' competent testimony on decrease in fair cash market value (R. 153-154; 157-158; 160-163), and the Commission's view of the property as contemplated by the Order of appointment (R. 37), to which great weight is attached. See *e.g.*, *United States* v. *Wise*, 131 F.2d 851, 853 (4th Cir., 1942); *United States* v. *Certain Lands Located in Orange County*, 57 F. Supp. 96, 98 (S.D.N.Y., 1934); *United States* v. *80.46 Acres in Erie County*, 59 F. Supp. 876, 877 (W.D.N.Y., 1944), *aff'd*, 148 F.2d 714 (2d Cir., 1945). In any event, the awards were below *both* the landowners' valuations and those of Mr. Willcox, which the Commission judged with the advantage of a view of the lands (R. 39).

At pages 8 and 9 of the Petition the Government contends that the reports and findings did not state whether the Commission relied upon a mathematical formula stated by Mr. Willcox, did not state whether the managerial skill of the individuals operating the farms was considered, and did not state whether the Commission considered the testimony concerning offers. The awards themselves show that the mathematical formula was not relied upon, inasmuch

as there is not the relationship between the awards that there would be if the formula had been adopted, relied upon or used.[3] The only proof as to offers was evidence, pertaining solely to one tract, to the effect that *no* offers were received (R. 144-145). There was no proof of any offer as such. The only evidence as to managerial skill was the statement of Mr. Willcox, on cross-examination, that a well operated tract ordinarily sold for more than a poorly operated farm (R. 215-216).

The opinion of the Court of Appeals is not in error nor in conflict with decisions of this Court. The proper test on specificity of findings was applied.

2. There is no such conflict with other Circuits, nor with perplexing adversity in decisions, as to call for review by this Court. While the opinion in *United States* v. *2872 Acres of Land in Clay and Quitman Counties, et al.*, 310 F.2d 775 (5th Cir., 1962), states that it is "at variance" with the opinion below, we submit the Tenth Circuit's decision does not create any "real and embarrassing conflict of opinion and authority" requiring review by this Court.[4] *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The remainder of the decisions relied on by

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[3] For example, compare the testimony of Mr. Willcox concerning the first two tracts, A-104E and A-106E. His opinion was that the latter tract's damage was the larger (R. 154, 157). However, the Commission's award for the latter tract was less than one-third its award for the former (R. 40-41).

[4] A petition for certiorari has been filed in No. 850, this Term, seeking review of the judgment of the Fifth Circuit. On March 21, 1963, a memorandum was filed by the Government joining in the request for review, and claiming conflict between the Fifth Circuit opinion and that of the Tenth Circuit in the instant case.

the Government as conflicting actually harmonize with the Tenth Circuit's views.

The *Clay and Quitman Counties* opinion of the Fifth Circuit does refer to the absence of indication as to which evidence was credited and which was discredited. 310 F.2d at 777. It observes that the commission failed to state whether it was certain proof of sales or opinion evidence that sustained the land values found. 310 F.2d at 779. However, the rationale of the opinion, as expressed below, reveals as much of harmony as of discord and underscores the *ad hoc* nature of the decision:

> "Although admittedly the scope of review, either by the trial court of the commissioners' findings of valuation or by this Court on the trial court's judgment, is restricted in the sense that a reversal is to be had only if the order under review is clearly erroneous, this function cannot be adequately performed by the reviewing court unless the fact finder makes it plain what the basis of its decision was. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do say, however, that there must be sufficient finding of subsidiary facts so that it will appear to the reviewing court that the ultimate finding of value was soundly and legally based . . ." 310 F.2d at 779.

These opinions of the Fifth and Tenth Circuits present no "real and embarrassing conflict." Their results represent judgments formed on separate records, with permissible differences in evaluation as to details required in the findings.

Examination of the remaining cases from the Second, Third, Fourth, Fifth and Ninth Circuits, cited at page 6 of the Petition, reveals no conflict with the opinion below. These decisions merely record rulings as to findings made on particular facts. Of them it is stated that the "rule" of these Circuits is to require "meaningful reports showing the facts found and the law applied in reaching an award." (Petition, pp. 5-6). What the Tenth Circuit said and did here cannot be read as creating a conflict.[5]

Indeed, reliance on *United States* v. *Lewis*, 308 F.2d 453 (9th Cir., 1962), to establish a conflict seems wholly misplaced. In the first two cases decided by this opinion, findings were held insufficient because the highest and best use of the land was not specified and the consideration given to gravel deposits was ignored. In the second two cases involved in the *Lewis* opinion, the findings covered these points and were sustained—as in the instant case where the highest and best use *was* found and consideration of value as a sand pit *was* excluded. In rejecting the Government's demand for still further details, the Ninth Circuit stated:

> "The objections of the United States in these cases seem to be directed to the fact that the findings and report do not disclose what proof the commission relied on and why the commission chose to believe certain witnesses and accept certain evidence as more credible

[5] Where the issues are simple as in the instant case, the *Cunningham* opinion, relied on in part for the asserted conflict, stated that the decision "could be reviewed as well without findings as with them." *United States* v. *Cunningham*, 246 F.2d 330, 333, n. 1. (4th Cir., 1957).

than other witnesses and other evidence. Findings need need not be so comprehensive. They should, as the United States asserts, show 'how' material factual disputes relating to value have been resolved. But this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result. We conclude that the findings and report in each case are sufficient." 308 F.2d at 460.

3. The Petition does not justify certiorari on the importance of any question involved here. In the opinion below, the Tenth Circuit properly reasoned that the particular facts of each case determine the "exactness of the findings required . . ." *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 419 (1943). Therefore, it is somewhat difficult to conceive the important and binding precedent that would result from review in the instant case. Our record—on these tracts, these clearance easements, this sand pit, this testimony and view by this Commission—serves as no broad base for a pronouncement from this Court. Since only the application to particular facts of the rule of procedure on findings is involved, a precedent by this Court would not seem to be required or possible. See *Commissioner* v. *Factor*, 364 U.S. 932 (1961), *denying cert.* in *Factor* v. *Commissioner*, 281 F.2d 16 (D.C. Cir., 1960); *Factor* v. *Commissioner*, 364 U.S. 933 (1961), *denying cert.* in *Factor* v. *Commissioner*, 281 F.2d 100 (9th Cir., 1960).

The importance to warrant review of the opinion below is not shown. The Government relies primarily on the volume of condemnation litigation, including that in the Tenth Circuit, to illustrate the significance of the instant

case. However, no special guidance for the courts seems necessary or practicable or possible by a review of the Tenth Circuit's assessment here, on a particular record, as to the itemization called for in findings by this Commission.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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April, 1963.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 65

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS T. MERZ ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 471) is reported at 306 F. 2d 39.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1962. (R. 479). A timely petition for rehearing *en banc* was denied on September 6, 1962 (R. 479, 480). On December 3, 1962, Mr. Justice White extended the time to file a petition for a writ of certiorari to February 4, 1963 (R. 480). The petition was filed on February 4, 1963, and granted on April

22, 1963 (R. 481). 372 U.S. 974.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an eminent domain proceeding, a district court may adopt the reports of a commission it has appointed pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure to determine the issue of just compensation, if the reports state only the ultimate awards made by the commission and fail to show what evidence was considered by the commission, what law was applied, and what was the basis of the ultimate awards.

RULES INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides, in pertinent part:

> (e) Report.
>
> * * * * * *
>
> (2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive

[1] At the same time, certiorari was granted in a companion case, *United States* v. *2,872.88 Acres in Clay and Quitman Counties*, 310 F. 2d 775 (C.A. 5), 372 U.S. 975.

further evidence or may recommit it with instructions.

Rule 71A of the Federal Rules of Civil Procedure provides, in pertinent part:

> (h) Trial.
>
> If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

In March 1956 the United States instituted condemnation proceedings to obtain clearance easements[1] over twelve tracts of farmland for military and other purposes in connection with the Clinton-Sherman Air Force Base in Oklahoma (R. 2). In March 1957 the complaint was amended so as to obtain clearance easements over two additional tracts and the fee interest in another two tracts (R. 23). The clearance easements were sloping and their elevation over the various farms ranged from 13 feet to 164 feet.

The parties stipulated regarding the compensation to be paid for the interests taken on six of the tracts. With respect to the remaining ten tracts, the district court, upon the landowners' motion and over the government's objection, ordered the issue to be tried before a commission pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure (R. 9, 26, 33, 37).

At the commission's hearing, the parties stipulated that the highest and best use of the land was for general agricultural purposes. The extent to which this purpose was affected by the clearance easements was disputed among the landowners' and the government's witnesses. In addition, the landowners claimed that their property had certain mineral value which was affected by the easements. The degree to which the

[1] Unlike avigation easements, clearance easements do not involve flights. Clearance easements place a ceiling over land above which obstructions may not extend. See *United States* v. *Brondum*, 272 F. 2d 642, 643–647 (C.A. 5). Some of the landowners in the present case have also filed suit in the Court of Claims seeking damages for the alleged taking of avigation easements. *Davis* v. *United States*, C. Cls. No. 179–59.

easements would interfere with exploitation of the mineral estates was also put in issue. Expert witnesses testified concerning the value of the tracts both before and after the easements had been taken. L. A. Willcox, a witness offered by the landowners, testified at great length concerning a formula of his own devising whereby the injury caused by a clearance easement could be assessed, and he purported to compute the specific injury caused to each of the tracts. The commission also viewed the premises.

The commission filed its initial report on November 9, 1959 (R. 37). This report, appended to the government's brief as Appendix I (pp. 31–39, *infra*) merely recited the names of the commissioners, then listed each of the ten tracts involved (as described in the declaration of taking), and followed each description with a dollar figure representing "Damages Assessed."[3] The total awards came to $49,982. (Appendix III, p. 46, *infra*.)

The government objected to the adequacy of this report for judicial review. (R. 44). The matter having apparently been resubmitted informally to the commission by the district court, the commission filed an "Additional Report" on October 7, 1960 (R. 45–49). This report appears as Appendix II to the government's brief (pp. 40–44, *infra*). The supplemental report contained under the heading "Findings of

[3] The initial report also rejected certain claims pertaining to possible use of the land made by the owners of one of the fee interests which had been taken. Since the government did not appeal from the district court judgment on the fee interest, these findings are not relevant in the present posture of the case.

Fact": (1) the heights of the clearance easements; (2) the fact that one tract was taken in fee; (3) the names of the fee simple owners of all the tracts; (4) the tracts on which oil and gas leases were outstanding; (5) the fact that one party's partial one-quarter mineral share was, by stipulation, to be treated as a full one-quarter mineral share; and (6) the fact that the highest and best use of the land was for general agricultural purposes (R. 46–47).

Under the heading "Conclusions of Law," the supplemental report advised that: (1) the United States was entitled to take the property and the landowners were entitled to just compensation; (2) just compensation was to be determined by subtracting the value of the landowners' interest immediately after the taking from its value immediately before the taking; (3) the use to which the government would put the area taken by the clearance easements was not an issue in the case; and (4) certain evidence pertaining to the tract taken in fee simple was stricken, and the government's motion to strike the testimony of Willcox was overruled.

The government renewed its objections to the commission's reports on the grounds previously stated and on other similar grounds (R. 49–52). Thereafter, the District Judge informally advised the parties of his intention to adopt the commission's report (R. 53), and the report was officially adopted in a judgment dated January 13, 1961 (R. 57–69). The judgment set out no additional grounds of decision, but merely "adopted in all respects" the commission's

report "as the findings and judgment of this Court" (R. 54).

The government appealed.[4] Although the court of appeals acknowledged that the valuation evidence was conflicting and that only "a general finding as to this amount [the amount of compensation due] was made," it affirmed the judgments. Observing that the "extent of exactness which is required in findings depends upon the nature of the matter involved," it held that the "issues in this case are not complicated * * * and the findings are entirely adequate to permit us to review them and to conclude that they are not clearly erroneous" (R. 474–477).

The court of appeals recognized that there "was a sharp conflict in the evidence as to the amount of * * * damages." It upheld the *findings*, however, because it found the *awards* to be "well within the range of this conflicting testimony." It did not indicate what evidence it believed the commission or the district court had relied on. The government's petition for rehearing *en banc*, calling attention to decisions of the Fourth and Ninth Circuits rendered after argument of the present case, was denied without opinion.

SUMMARY OF ARGUMENT

A. An analysis of the commission's reports discloses that they fail to state how the commissioners

[4] Only eight clearance easements are involved in the present posture of the case. The government did not appeal from the judgment regarding the fee simple interest, and the government's motion to dismiss its appeal as to one tract on which only an undivided one-half mineral interest was involved was granted by the court of appeals on August 17, 1961.

resolved factual and legal issues which emerged during the hearing. Instead of supplying "findings * * * which are sufficient to indicate the factual basis for the ultimate conclusion," *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 422, the commission's reports contained only the awards assessed by the commission and general statements of stipulated facts and self-evident propositions of law.

B. Rule 71A(h) of the Federal Rules of Civil Procedure explicitly provides that a condemnation commission's "findings and report" shall be dealt with by the district court in accordance with the practice prescribed in Rule 53(e)(2), which, in turn, requires acceptance of the findings unless they are "clearly erroneous." The district court can meet its obligation to review the commission's findings meaningfully only if the commission's report states findings and articulates the grounds of the commission's decision.

C. In addition, the district court must determine whether the commissioners have correctly applied legal principles in considering the evidence and in determining the compensation which is due. This can be done only if the commission states the principles of law which it has applied, and how it has applied them.

D. Gaps in a commission's findings cannot be filled by the district court. They must be filled by the commission, which saw and heard the witnesses and is the sole judge of their credibility and of the weight to be given to their testimony. Nor may the court of appeals simply review the dead record and decide that it is satisfied with the commission's conclusions

when there is no way of knowing what evidence the commission considered or whether it correctly applied the pertinent principles of law. Inadequate commission reports cannot be allowed to destroy the essentials of the right to a judicial hearing.

ARGUMENT

THE REPORTS SHOULD HAVE BEEN RECOMMITTED TO THE COMMISSION BY THE DISTRICT COURT BECAUSE THEY FAILED TO ARTICULATE SUBSIDIARY FINDINGS AND LEGAL REASONING WITH SUFFICIENT PARTICULARITY TO PERMIT MEANINGFUL JUDICIAL REVIEW

A. THE INITIAL AND SUPPLEMENTARY REPORTS CONTAINED ONLY FINAL CONCLUSIONS AND DID NOT SET OUT THE FACTUAL BASIS FOR THESE CONCLUSIONS

The brief summary provided at pp. 5–6, *supra*, of the contents of the commission's two reports (which are reprinted in full as Appendices at pp. 31–44, *infra*) shows that the commissioners articulated no particular findings on any subsidiary issues of fact or law. The first report (insofar as it is relevant to the case in its present posture)[3] merely announced the dollar figures representing the commissioners' conclusions as to the value of each of the easements. The second report contained more precise statements regarding the height of the clearance easements (which had been stipulated), the names of the fee owners of the tracts (which were irrelevant to "the issue of just compensation"), the existence of certain mineral leases (which had not been disputed), and the "highest and best use of the land" (which had been stipulated). None of these supplemental "Findings of Fact" supplies any

[3] See note 3, p. 5, *supra*.

clue as to the basis upon which the commissioners reached their awards.

Nor were the "Conclusions of Law" set out in the second report helpful in divining the commissioners' reasons for deciding as they did. The first says only that there is a right to just compensation; the second simply states that the value of a condemned easement is measured by the diminution in the value of the servient estate; the third announces the obvious proposition that a clearance easement is not an avigation easement; and the fourth, insofar as it is relevant, merely keeps certain evidence in the record. In summary, the report which the commission submitted to the district court did nothing more than announce, as an *ipse dixit*, the commission's ultimate conclusions regarding the value of the condemned clearance easements.

Five days of testimony before the commission had produced 439 pages of transcript. There emerged from the hearing at least five subsidiary issues of fact, in addition to many questions of law, which the commissioners necessarily had to resolve before they could arrive at a reasoned estimate of the value of the condemned easements. The following are illustrative factual questions:

(1) *What was the market value of the land before the taking?*—The landowners' own testimony was that the value of the seven[*] tracts of land before the ease-

[*] Two of the clearance easements were taken over different portions of the same 60-acre tract. Hence while the case concerns eight easements, it involves only seven tracts.

ments were taken ranged from $18,000 to $40,000 (R. 73–118). Another witness who testified on behalf of the landowners assessed these tracts at values ranging from $13,000 to $60,200 (R. 125–132).[1] Based on 24 comparable sales, the government's witnesses testified that the land had values between $12,260 and $31,200 (R. 259–402). (See Appendix III, pp. 45–46, *infra*.) The commission properly concluded that the award should represent the difference between "the fair cash market value of the estate of the defendants at the time of the taking and fair cash market value of the estate of the defendants immediately after said taking." But it failed to demonstrate that it had even completed the initial step of discovering the minuend for this exercise in subtraction. It also failed to disclose whether it had considered the evidence of comparable sales presented by government witnesses.

(2) *What was the proportional depreciation in value attributable to the easements?*—All but one of the landowners testified flatly that the value of their land had been reduced by approximately 50 percent as a result of the takings (R. 73–124). One landowner testified that it was diminished by one-fifth of its earlier value (R. 114–115). The landowners' other witness, an appraiser named Willcox, proposed a formula of his own devising by which the value of

[1] Interestingly enough, the tract estimated by this witness at $60,200 was valued by its owner at only $25,000, whereas the tract estimated by the witness at $13,000 had been assessed at $40,000 by its owner. These substantial disparities merely illustrate the great range of differences which existed even among the respondents' witnesses.

a clearance easement could be computed (R. 179).[8] The government's witnesses based their assessments on the extent to which the easements would interfere with farming operations on the property or with the development of mineral deposits in the land (R. 259–402). The commission denied the government's motion to strike the testimony of Willcox. Consequently, it has given no indication whatever as to the method that it used to decide what percentage of a tract's total value was affected by the taking of the easements.

(3) *What was the value of the mineral estates?*—Most of the landowners did not value their surface and mineral estates separately. The son of one landowner testified, however, that the mineral estate on his mother's property was worth $50 an acre (R. 120). Willcox, the landowners' expert witness, based his computations on the premise that the full value of the mineral estates on each of the tracts was $75 per acre (R. 164). The government's expert witness on the subject of mineral values assessed the full title to all mineral interests on the land at either $30 or $35 per acre.[9] The commissioners' reports did not resolve this conflict.

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[8] This formula was never stated clearly, but it appears to be as follows:

$$\frac{\text{per acre value of land and buildings}}{200} \times (200 \textit{ minus } \text{average height of the easement}) \times \text{acres of land affected} = \text{award for surface damage}$$

[9] He testified that the difference in valuation was based upon whether the tract was on the north or south sides of the air force base. He found the south side more valuable because of its proximity to "higher priced leases" (R. 239).

(4) *What was the injury to the mineral interests caused by the easements?*—The landowners' expert witness testified that in most cases the mineral estate would be a total loss as a result of the clearance easements (R. 127). The government's expert witness testified that the extent of the loss would depend on the height of the permissible ceiling and other topographical factors (R. 240, 243). Accordingly, in some cases he concluded that the effect of the easement was to depreciate the value of the mineral interest to one-seventh or one-sixth of its unencumbered value, and in others he found that the mineral estate was unaffected or only slightly reduced (R. 240–241). The commission made no finding upon this issue.

(5) *What would be the practical effect of the easements on agricultural use of the land?*—The landowners generally admitted that the clearance easements would not interfere with their use of the land for agricultural purposes (R. 77–120). Their expert witness indicated that he believed that some crops could not be grown on certain farms as a result of the easements (R. 137), and that the use of the land for pasture might be restricted (R. 184). The commission made no finding on this issue.

In summary, what the hearing revealed was that the valuation hinged on the commission's preliminary resolution of many issues. Some of these issues are attributable to the type of easement which was taken, and others are ordinary recurring questions of valuation. In addition, issues of law were argued before the commission and had to be resolved (see pp. 24–26,

infra). Yet the commission did not make a single finding which would reveal the basis for its computations and for its ultimate dollar awards.

B. THE CONCLUSORY REPORTS FILED BY THE COMMISSION EFFECTIVELY PRECLUDED THE JUDICIAL REVIEW OF FINDINGS OF FACT PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 71A(h) authorizes a trial of "the issue of just compensation" in federal condemnation cases to be held before a commission of three persons appointed by the court. The rule further provides explicitly that the effect of the "findings and report" of such a commission is to be the same as that set out in Rule 53(e)(2). The latter provision, which pertains to the reports of masters in non-jury cases, states, "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.'" Accordingly, it is the duty of a district court which has submitted the issue of just compensation in a condemnation case to a commission, to assess each of the factual determinations underlying the commission's conclusion by the same standard which Rule 52(a) directs courts of appeals to apply in reviewing a district court's findings of fact in non-jury cases. The conclusory reports filed in the present case effectively foreclosed any such judicial review.

The principle that factfinders whose determinations are subject to judicial review must state their findings with sufficient specificity to permit intelligent assessment of their correctness is based on good sense and sound judicial administration. It is impossible for

an appellate tribunal to determine whether conclusions based upon resolutions of factual issues are valid unless it knows how the factual issues were determined in the first instance. And it is in no position to judge whether the underlying factual premises were supported by evidence in the record and were not "clearly erroneous" unless these premises have been articulated.

Rule 52(a) of the Federal Rules of Civil Procedure requires that a district court in a non-jury case "find the facts specially." This Court has construed that provision to mean that the district court must make findings, "in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion * * * can rationally be predicated." *Kelley* v. *Everglades Drainage District,* 319 U.S. 415, 420; see *Commissioner* v. *Duberstein,* 363 U.S. 278, 292; *Hatahley* v. *United States,* 351 U.S. 173, 182; *Dalehite* v. *United States,* 346 U.S. 15, 24, n. 8.

Rule 52(a) itself obviously does not apply to the report of a condemnation commission, but the same underlying policy of requiring triers of fact to state sufficiently detailed findings to provide the basis for efficient review of questions of law and fact governs proceedings under Rule 71A(h). The need is identical, as the present case demonstrates. See pp. 19–21, *infra.* And Rule 71A(h) contemplates that the commission will make "its findings and report." The plural "findings" and the conjunctive reference to "findings and report" make it plain that this requirement is not satisfied by a skeleton statement of

the conclusion reached. Rule 71A(h) requires of a commission, just as Rule 52(a) requires of a district court, that it submit more than an "unelaborated finding of ultimate fact." *Commissioner* v. *Duberstein*, 363 U.S. 278, 292. In each case the bare conclusion defeats the purpose of the rule because full findings are "of the highest importance to a proper review." *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 316.

Even if Rule 71A(h) were entirely silent on the subject, the proper administration of condemnation cases would require that commissions make findings of fact. For the principle that findings of fact upon which a tribunal's judgment rests must be articulated by that tribunal does not depend on the particular language of any Rule of Civil Procedure. In *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U.S. 67, 69, 71, a case which antedated the adoption of the Federal Rules, this Court reversed an interlocutory injunction and remanded the case to the three-judge district court "for findings and conclusions appropriate to a decision upon the application for an interlocutory injunction," notwithstanding its observation that no rule of procedure expressly required the district court to articulate the grounds for its decision. The holding was based on the court's view that "a statement of the grounds of decision, both as to facts and law" was necessary as an aid to litigants and to the reviewing court.

The same has been true of judicial review of administrative agencies. While the standard of review for administrative agencies' findings of fact is somewhat different from the "clearly erroneous" prin-

ciple covering review of district courts, this Court has consistently required agencies to set out the factual basis for their ultimate conclusions. Only last Term, in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167–168, it was noted that the Interstate Commerce Commission had articulated "no findings and no analysis * * * to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." The court concluded, "We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice."

Section 8(b) of the Administrative Procedure Act, relied upon by the Court in *Burlington Truck Lines*, reaffirms a rule which was established well before the Act became law. In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94, this Court observed that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." This conclusion was based on the Court's premise, which is fully applicable here, that "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." See also *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488–489; *Florida* v. *United States*, 282 U.S. 194, 215; *cf. Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 81. The perplexing problem with which a reviewing court is confronted when an agency or lower court has failed to state its grounds of decision was summed up by Mr. Justice Cardozo in *United States* v. *Chicago, Milwaukee, St. P. & Pac. R. Co.*,

294 U.S. 499, 510–511: "In the end we are left to spell out, to argue, to choose between conflicting inferences. * * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Rule 71A(h) of the Federal Rules of Civil Procedure does not expressly direct commissioners to "find the facts specially," as does Rule 52(a) with respect to district courts. Nor does Rule 71A(h) even make applicable to condemnation commissioners the subsection of Rule 53(e) which instructs masters to set forth findings of facts in their reports "if required to make" such findings.[10] But Rule 71A(h) does contemplate that the commission will file a report with the district court and that its findings of fact will be reviewed by the latter in accordance with the "clearly

[10] This expression appears in Rule 53(e)(1), which is not referred to in Rule 71A(h). The fact that Rule 53(e)(1) appears to make the submission of findings conditional on the master's being "required" to make such findings should not be taken as a negative implication that, in the absence of specific instructions a master's report is adequate if supporting facts and legal reasoning are omitted. Since Rule 53 provides that masters may be appointed for various purposes, some of which may not require any determination of issues of fact, the Rule had to be so phrased as to cover instances when no findings had to be made. An auditor, for example, might be appointed as a master to combine several books of account into a single manageable document. His report might then consist only of his finished product, and his task would not require him to make findings of fact or conclusions of law. It is the government's position, however, that when a master is appointed to determine ultimate issues of fact, and when his conclusion must be based upon the resolution of conflicting testimony and/or controverted questions of law, he *must* state the grounds of his decision in his report in order to render it judicially reviewable.

erroneous" standard of Rule 53(e)(2). If this review is to be meaningful at all, the district court must require the commission to specify the subsidiary facts it found and on which it relied in reasoning towards its ultimate findings.

The present case cogently illustrates the need for an elaboration of a commission's grounds of decision. As has been demonstrated above (pp. 10–14, *supra*), many issues of fact touching upon the valuation of the easements were presented to the commission. The form which the commission's report took made it utterly impossible for the district court to examine the commission's resolution of these factual issues and to determine whether or not any of them, or any inference the commission based upon them, was "clearly erroneous." The landowners, for example, generally maintained that the value of their property had been reduced by one-half as a result of the easements, regardless of the varying heights of the clearances. If the commissioners accepted this position it would have been clear error requiring rejection of their reports. But it is impossible to tell from the reports whether they did or not, since the reports do not even state the market value which the tracts had before or after the taking. Or, for example, the commissioners may have adopted the mistakes made by the landowners' expert witness, who assessed the injury to the mineral estates at their full value regardless of the varying heights of the easements, and who erroneously applied a rigid formula as the basis for his testimony. Indeed, error of the most basic and clearest sort may have been committed if the commission, applying the standard set out in its Second

Conclusion of Law, made an arithmetical mistake in subtracting the "after" figure from the "before." But even so fundamental a matter was concealed from further scrutiny by the conclusory form of the commission's findings.

In addition, proper judicial administration requires that commissions make findings of fact in order to insure that they have given full consideration to all the elements of a case. As the Court of Appeals for the Second Circuit said in *United States* v. *Forness*, 125 F. 2d 928, 942–943 (C.A. 2), certiorari denied *sub nom. City of Salamanca* v. *United States*, 316 U.S. 694:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. * * * To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be.

Those observations apply with special force to the proceedings of commissioners under Rule 71A(h). Since the rule sets out no qualifications for member-

ship on a commission, and does not even require that any member of the commission be a lawyer, it is most desirable that the commissioners be required to articulate their grounds of decision so as to focus their attention on the dispositive issues. In addition, a report should set out the evidence on which the commission relied, both as necessary self-discipline and to facilitate judicial review. Commissions often hear evidence sporadically over a period of time and may not make reports until long after the evidence is in. Consequently, reviewing the evidence and making specific findings are useful methods of recalling to the commissioners' minds the critical factual issues on which determination of just compensation hinges. And since no judge regulates the evidence which a commission is able to hear, the requirement that findings be made is necessary to insure that the commission relies only upon admissible evidence.

The need for specific subsidiary findings of fact in commission-tried condemnation cases has been recognized in decisions of the Second, Third, Fourth, Fifth and Ninth Circuits,[11] but these decisions do not an-

[11] *United States* v. *4400 Acres in the Town of Greece (Odenbach)*, 234 F. 2d 410, 411, 414 (concurring opinion 416), (C.A. 2), certiorari denied, 352 U.S. 916; *United States* v. *Bobinski*, 244 F. 2d 299, 301–302 (C.A. 2); *United States* v. *Certain Parcels of Land in Philadelphia (Merchants Exchange)*, 215 F. 2d 140, 142, 144–146 (C.A. 3); *United States* v. *Cunningham*, 246 F. 2d 330, 333 (C.A. 4); *United States* v. *Carroll*, 304 F. 2d 300, 304–306 (C.A. 4); *United States* v. *2,477.79 Acres in Bell County (Bowles)*, 259 F. 2d 23, 29 (C.A. 5); *United States* v. *Leavell & Ponder, Inc.*, 286 F. 2d 398, 406–409 (C.A. 5), certiorari denied, 366 U.S. 944; *United States* v. *2,872.88 Acres in Clay and Quitman Counties*, 310 F. 2d 775 (C.A. 5), certiorari

nounce either a uniform standard for the content of the reports or a uniform rule governing the functions of a reviewing court. In the present case, the court of appeals held that the commission's final conclusion was enough because the appellate court could review the transcript. *United States* v. *Lewis*, 308 F. 2d 453 (C.A. 9), held that a bare conclusion was insufficient and remanded two of the five cases considered in that opinion to the commission for complete reports. It further held as to the other three cases that reports which state how the commission arrived at its conclusions are adequate, even though they do not show what the evidence was. This rule imposed on the district court the burden of comparing the evidence with the reports, and the cases were remanded to the district court for that purpose. *United States* v. *2,872.88 Acres in Clay and Quitman Counties*, 310 F. 2d 775 (C.A. 5), certiorari granted, 372 U.S. 975, held that reports which summarized the evidence but did not show how the commission reached its conclusions were inadequate. Our position is that the report should show both what the evidence was and how the commission used it in reaching its conclusions. Then the reviewer, either the district court or the court of appeals, must look at the transcript only to the extent that the parties contend the report's statements are wrong. In the absence of objections to the factual accuracy of the report, the reviewing court will be able to judge from the face of the report

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granted, 372 U.S. 975; *United States* v. *Lewis*, 308 F. 2d 453, 455–456, 458–460 (C.A. 9); *Louis Gill and Sons* v. *United States*, 313 F. 2d 416 (C.A. 9).

whether the findings are supported by evidence and whether the commission has committed an error of law.

The court of appeals in this case attempted to distinguish the decisions in other circuits on the ground that the "issues in this case are not complicated" (R. 477). In comparison with many condemnation cases this was, indeed, a simple case, but it clearly illustrates the need for a full report in all cases referred to a commission. The appearance of facility with which the commission purported to resolve the issues results from its confining its "findings of fact" (except those concerning damages) to an irrelevancy such as the ownership of the fee or to matters on which the parties had stipulated. By ignoring the real controversies underlying the issue of just compensation, the commission was able to produce findings which were largely indisputable and assuredly immune from reversal on appeal.

The fact that juries in condemnation cases return general verdicts which state only dollar valuations is of no bearing on the present issue. *First,* juries are the final triers of fact. If there is evidence in the record warranting submission of a case to the jury, its findings of fact are non-reviewable. Findings by condemnation commissions, on the other hand, are to be reversed under Rules 71A(h) and 53(e)((2) if the district court is satisfied that they are clearly erroneous—*i.e.*, if it "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395. Hence the commission's findings, unlike those of a jury, must be in a form which permits in-

telligent review. *Second*, juries hear and consider only such evidence as is admitted by a district court, whose rulings on evidentiary questions are matters of record and may be appealed. *E.g., McCandless* v. *United States*, 298 U.S. 342, 345–348. *Finally*, the law applied by juries is also a matter of record insofar as it is reflected in the instructions of the trial judge. Faulty instructions are ground for reversal. But, as we develop *infra*, the law applied in commission-tried cases cannot be effectively reviewed if the report is conclusory only.

C. THE CONCLUSORY REPORTS FILED BY THE COMMISSION EFFECTIVELY PRECLUDED JUDICIAL REVIEW OF ISSUES OF LAW

In addition to the provisions of the Federal Rules which direct district courts to review a commission's findings of fact, the courts must also supervise the application of legal principles to the facts of the case. In this respect, the district court is not limited by the "clearly erroneous" standard of Rule 53(e)(2), but has the duty of considering each issue of law on its own merits. *E.g., Dalehite* v. *United States*, 346 U.S. 15, 24, n. 8. Since the reports of the commission concealed not only its subsidiary findings of fact but also the principles of law which it applied, it was error for the district court to accept the reports.

It is hardly necessary to observe that errors of law which the district court could not commit without suffering reversal cannot be committed with impunity by the commission which it appoints and whose order it enforces. A conclusory commission report may conceal just such errors. For example, if the commission used the mathematical formula devised by the landowners' expert witness for measuring

damages, the evidence of which it refused to strike (R. 126–127), that would have been an error of law, both because valuation is not a matter of formulas, *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402; *United States* v. *Cors*, 337 U.S. 325, 332, and because the particular formula was patently erroneous.[12] Or if the commission considered the managerial skill of the landowners in determining the value of the tracts, as was suggested by the landowners' expert witness (R. 170–171), that too was an error of law. Since managerial skill is non-transferable, it is not a proper element of value for federal condemnation purposes.

[12] The formula (see note 8, p. 12, *supra*) was arbitrarily based on the assumption that clearance is valuable up to 200 feet, and that each foot of clearance up to that height is equally valuable. Obviously, however, there is a substantial difference between being unable to use the space which is between 10 and 20 feet off the ground and that which is between 180 and 190 feet off the ground, although each involves only 10 feet in vertical measure. Moreover, the surface value of land is not composed solely of the sum of the value of all cubic inches of airspace above the land. The formula assumes, however, that land has only the value of the airspace above it.

It is no answer to say, as did the court of appeals (R. 478), that the commission properly stated the general measure of damages as an abstract principle or that the possible error of law in admitting Willcox' testimony "was not prejudicial to the United States." This approach would unfairly put upon the losing party the impossible burden of demonstrating, on the basis of a noncommittal report, that acknowledged error had been prejudicial in some specific way. Such a shift of the burden would be directly contrary to this Court's holding in *McCandless* v. *United States*, 298 U.S. 342, 347–348, "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (Emphasis in the original.) Here it can hardly be said that the record affirmatively shows that the commission ignored testimony which it explicitly refused to strike.

Kimball Laundy Co. v. *United States*, 338 U.S. 1, 5. Or if the commission capitalized assumed oil and gas bonuses and rentals as suggested by the landowners' expert witness (R. 163–164), that was an error of law. Since such bonuses and rentals were "not fairly shown to be reasonably probable," they should have been excluded as speculative. *Olson* v. *United States*, 292 U.S. 246, 257. Or if the commission construed the words "other materials" in the declaration of taking to prevent the use of certain farm machinery on the land (R. 181–183),[13] that too was an error of law.

Yet none of the commission's rulings on these questions appears in its reports. Instead, the reports' "Conclusions of Law" pertain to irrelevancies or to abstract propositions which are indisputable. Their effect is to prevent any judicial examination of whether proper legal principles were applied to the facts of the case.

D. THE GAPS IN A COMMISSION'S FINDINGS CANNOT BE FILLED BY THE DISTRICT COURT

In the present case the district court did not attempt to supply the findings omitted by the commissioners, so that a final decision was rendered without any findings of fact—a plain violation of the principles of judicial administration and of the policy underlying Rule 52(a), even though the rule itself may

[13] The commission heard argument on this point and stated during the hearing that it would "have to make a construction of this, and we have to show in our report how we construed this" (R. 183). No indication as to how the words were construed appears in the reports.

not be applicable when a case is referred to a commission under Rule 71A(h). In fact, it was then too late to remedy the defect except by remand to the commission pursuant to Rule 71A(h) and Rule 53(e)(2). Gaps in commissioners' findings, except those involving pure formalities, cannot be filled by the district court.[14] This is a further reason for requiring full and complete findings in a commission's "findings and report."

[14] Certain decisions in the Fourth and Fifth Circuits appear to imply that a district court is free, if it rejects a commission's findings of fact as "clearly erroneous," to enter findings of its own on conflicting testimony, and that these findings may be reversed by a court of appeals only if the district court is "clearly erroneous." See, *e.g.*, *United States* v. *Twin City Power Co.*, 248 F. 2d 108, 112 (C.A. 4), certiorari denied, 356 U.S. 918; *United States* v. *Twin City Power Co. of Georgia*, 253 F. 2d 197, 201–203 (C.A. 5); *United States* v. *Certain Interests in Cumberland County*, 296 F. 2d 264, 268–269 (C.A. 4). But see *United States* v. *Carroll*, 304 F. 2d 300, 302–307 (C.A. 4). And see *United States* v. *Tampa Bay Garden Apts., Inc.*, 294 F. 2d 598 (C.A. 5), where a district court was permitted to supplement findings on the basis of the evidence before the commission without rejecting the commission's findings. It is the government's position that these decisions are incorrect both insofar as they sanction independent examinations and analyses of the dead record by district courts and clothe the factual conclusions reached by courts after such examinations with the presumption of correctness created by the "clearly erroneous" standard. The proper issue before both the district court and the court of appeals in such cases is whether the *commission's* findings, based upon personal observation of the witnesses, were "clearly erroneous." *United States* v. *Certain Parcels of Land in Philadelphia*, 215 F. 2d 140, 146 (C.A. 3); see *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 689; *United States* v. *Twin City Power Co. of Georgia*, 253 F. 2d 197, 205 (C.A. 5) (Tuttle, J., dissenting), and authorities there cited.

The proposition that a district court may not make findings of fact omitted by or different from those of the commissioners rests upon the familiar principle that the "one who decides must hear," *Morgan* v. *United States*, 298 U.S. 468, 481. Resolution of the factual issues in a condemnation case, especially of the questions of value, depends upon the personal appearance of the witnesses under cross-examination and other intangible indicia of reliability that are available only to those who see and hear the witnesses themselves. Normally, as in the instant case, there is a wide range of valuations, each with support in expert testimony, and the outcome depends upon the impression left by individual witnesses, their demeanor, their candor, and their straightforwardness and persuasiveness under cross-examination. *United States* v. *Glanat Realty Corp.*, 276 F. 2d 264, 267 (C.A. 2); *H. & H. Supply Co.* v. *United Sattes*, 194 F. 2d 553, 556 (C.A. 10); *United States* v. *Delano Park Homes*, 146 F. 2d 473, 475 (C.A. 2). The same considerations that preclude an appellate court from making new findings where a wrong approach to valuation was followed by the trier of facts prevent a judge from making findings upon contested issues before a commission.

> Although the evidence does appear of record, we think it inappropriate for us to make the ultimate conclusion upon which decision must rest. There well may be further evidence which in fairness the parties should be allowed to present, since the case went off below on a different theory of valuation. Moreover, since

> the conclusion must be one reached not mechanically, but through the exercise of judgment on the evidence, it should be formulated in the first instance by the trial judge, subject to the usual appellate review. He must of course bear in mind that the burden of proving the fact of loss, and, if any exists, then its amount, rests upon the condemnees. * * * [*United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 398 (C.A. 2).]

A fortiori it was error for the court of appeals simply to review the record and conclude that it was satisfied with the conclusions that the commissioners reached. Commissioners are not a jury. They operate quite differently, often hearing the case at intervals over a protracted period and delaying a report. The procedure is informal, lacking safeguards of due process. While commissions are often given admirable general guidance in advance, they receive no rulings from the judge upon the evidence and no instructions upon questions of law that develop, upon the particular facts during the hearings. A jury is given such guidance and instructions, which the jury is presumed to follow, so that it may apply them to the facts and reach the ultimate result. When there is a reference to commissions the sequence is usually reversed. The commission is to provide the "findings and report," to which the court will then apply the correct rules of law and reach the ultimate conclusion. This difference prevents treating the commission's ultimate conclusions like the verdict of a jury. In treating the case in that fashion the court of appeals erred.

The issue in this case—which concerns the procedure under Rule 71A(h), a rule with which this Court has not previously dealt—although in one sense narrow and procedural, in truth affects the fundamental fairness of condemnation proceedings in which there is a reference to commissioners. When there is a jury, either party is entitled to a judicial proceeding with all the safeguards directed to proper limitations upon the admission and consideration of evidence, full hearing and cross-examination and adherence to the applicable rules of law. Rule 71A(h) provides a useful alternative in certain cases, but it cannot operate fairly unless it preserves the essentials of the right to a judicial hearing. The best assurance that the commissioners will make a reasoned determination upon evidence is to require a report with full findings addressed to the issues. Such a report is also the only means of determining whether the findings are supported by evidence and consistent with the applicable law.

CONCLUSION

Too long a period has now elapsed for the old commission to make adequate findings and report upon the previous hearings. The judgment of the court of appeals should be reversed and the case remanded to the district court for a new trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROGER P. MARQUIS,
RAYMOND N. ZAGONE,
Attorneys.

SEPTEMBER 1963.

APPENDIX I

In the United States District Court for the Western District of Oklahoma

REPORT OF COMMISSION—FILED NOVEMBER 9, 1959

Comes Now the undersigned, Stansell E. Whiteside, Finis C. Gillespie and Jerry Tisdal, a commission appointed by this court, and do now respectfully report:

That pursuant to an order of this court made and entered on the 6th day of August, 1959, the above entitled cause was referred to the undersigned, as a commission; that pursuant to said order and the directions contained therein, said commission did notify all interested parties that a hearing would be held on the 8th day of September, 1959, at Clinton, Oklahoma; that said hearing was attended by Paul G. Cress, United States Attorney and George Camp, as attorneys for the condemnor; that the defendants were represented by their attorneys, Meacham, Meacham & Meacham, insofar as the following tracts of land were concerned:

Tract A-104E	Value of the Clearance Easement.
Tract A-106E	Do.
Tract A-107E	Do.
Tract A-118E	Do.
Tract A-119E	Do.
Tract A-122E	Do.
Tract A-123E	Do.
Tract A-124E	Do.
Tract A-142E	Do.
Tract A-142	Value of the Fee.

Whereupon, the parties having announced ready for trial, the matter proceeded to trial, and various witnesses who were duly sworn, were called to testify, and the commission having personally viewed the lands in question and having heard the testimony and evidence presented by the parties, hereby evidences *it* decision and makes its report thereon to this court as follows:

FIRST

We, the undersigned commission, assess and fix the damage and the fair cash market value of the interest of the estate in the following described real property, as appropriated by the United States of America on March 8, 1956, for the uses and purposes defined in the Declaration of Taking filed herein, to-wit:

Tract No. A-104E

Indian Meridian T. 10 N., R. 19 West, Section 3, A tract of land in the Southwest Quarter more particularly described as Beginning at a point on the South line of said Southwest Quarter, said point being 250.0 feet East of the Southwest corner of said Southwest Quarter; thence north and parallel with the West line of said Southwest Quarter 1940.0 feet to a point; thence Northwesterly on a straight line to a point on the North line of said Southwest Quarter, said point being 162.5 feet East of the Northwest corner of said Southwest Quarter; thence East along said North line 2375.0 feet to a point, said point being 102.5 feet West of the Northeast corner of said Southwest Quarter; thence Southwesterly on a straight line to a point 700.0 feet South and 190.0 feet West of the Northeast corner of said Southwest Quarter; thence South and parallel to the East line of said Southwest Quarter 1940.0 feet to the South line of said South-

west Quarter; thence West along said South line 2200.00 feet to the point of beginning.

The area described aggregates 134.70 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed---------- $16,718.00

Tract No. A–106E

Indian Meridian T. 10 N., R. 19 W., Section 3, A tract of land in Lot 2, Lot 3 and Southeast Quarter of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter more particularly described as: Beginning at the Northwest corner of said Lot 3; thence East along the North line of said Lot 3 and said Lot 2 a distance of 1547.5 feet to a point, said point being 227.5 feet East of the North Quarter corner of said Section 3; thence Southwesterly on a straight line 2660.55 feet, more or less, to a point on the East-West quarter line of said Section 3, said point being 102.5 feet West of the center of said Section 3; thence West along said East-West quarter line 1217.5 feet to the Southwest corner of said Southeast Quarter of the Northwest Quarter; thence North along the West line of said Southeast Quarter of the Northwest Quarter, and the West line of said Lot 3, a distance of 2640 feet, more or less, to the point of beginning.

The area described aggregates 83.70 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed---------- $5,261.00

Tract No. A–107E

Indian Meridian T. 10 N., R. 19 West, Sections 3 and 4 A tract of land being part of Lot 4 and part of the Southwest Quarter of the Northwest Quarter of Section 3, and part of Lot 1 and part of the South-

east Quarter of the Northeast Quarter of Section 4 and more particularly described as: Beginning at the Northeast corner of said Lot 4, Section 3; thence South along the East line of said Lot 4 and the East line of said Southwest Quarter of the Northwest Quarter 2640.0 feet, more or less, to the Southeast Corner of said Southwest Quarter of the Northwest Quarter; thence West along the South line of said Southwest Quarter of the Northwest Quarter 1457.5 feet to a point; thence Northwesterly on a straight line 2660.55 feet, more or less, to a point on the North line of said Lot 1, Section 4, said point being 167.5 feet West of the Northeast corner of said Section 4; thence East along said North line and the North line of said Section 3, a distance of 1487.5 feet to the point of beginning.

The area described aggregates 80.10 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed---------- $5,333.00

Tract No. A–118E

Indian Meridian T. 10 N., R. 19 West, Section 27. A tract of land in the Northwest Quarter of the Northwest Quarter and the North Half of the Southwest Quarter of the Northwest Quarter more particularly described as: Beginning at the Northeast corner of the Northwest Quarter of the Northwest Quarter: thence South along the East line of said Northwest Quarter of the Northwest Quarter and the North Half of the Southwest Quarter of the Northwest Quarter 1980.0 feet to the Southeast corner of said North Half of the Southwest Quarter of the Northwest Quarter; thence west along the south line of said North Half of the Southwest Quarter of the Northwest Quarter 1202.5 feet to a point; thence northeast-

erly on a straight line 1068.25 feet to a point, said point being 400.0 feet North and 250.0 feet East of the Southwest corner of the Northwest Quarter of the Northwest Quarter; thence North 920.0 feet to a point on the North line of said Northwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of the Northwest Quarter, said point being 250.0 feet East of the Northwest corner thereof; thence East along said North line 1070.0 feet to the point of beginning.

The area described aggregates 50.25 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed..... $4,900.00

Tract No. A-119E

Indian Meridian T. 10 N., R. 19 W., Section 27 Northeast Quarter of the Southwest Quarter, Southwest Quarter of the Southwest Quarter, and all that part of the Northwest Quarter of the Southwest Quarter and the South Half of the Southwest Quarter of the Northwest Quarter more particularly described as: Beginning at the Northeast corner of said South Half of the Southwest Quarter of the Northwest Quarter; thence South along the East line of said South Half of the Southwest Quarter of the Northwest Quarter and the East line of said Northwest Quarter of the Southwest Quarter 1980 feet to the Southeast corner of said Northwest Quarter of the Southwest Quarter; thence West along the South line of said Northwest Quarter of the Southwest Quarter 1320 feet to the Southwest corner thereof; thence North along the West line of said Northwest Quarter of the Southwest Quarter 1040 feet to a point, said point being 280 feet South of the Northwest corner thereof; thence Northeasterly on a straight line 947.32

feet to a point on the North line of said South Half of the Southwest Quarter of the Northwest Quarter, said point being 117.5 feet East of the Northwest corner thereof; thence East along said North line 1202.5 feet to the point of beginning.

The area described aggregates 138.73 acres more or less, situate in Washita County, Oklahoma.

Damages Assessed $8,500.00

Tract No. A-122E

Indian Meridian T 10 N., R. 19 W., Section 27 A tract of land in the West Half of the West Half of the Southeast Quarter more particularly described as: Beginning at the South quarter corner of said Section 27; thence North along the North-South quarter line of said Section 27 2640 feet to the center of said Section 27; thence East along the East-West quarter line 25 feet to a point; thence Southeasterly on a straight line 2660.55 feet to a point on the South line of said Section 27, said point being 355 feet East of the south quarter corner thereof; thence West along said South line 355 feet to the point of beginning.

The area described aggregates 11.52 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed $2,387.00

Tract No. A-123E

Indian Meridian T. 10 N., R. 19 West, Section 28 A tract of land in the East Half of the East Half of the Southeast Quarter more particularly described as: Beginning at the Southeast corner of said Section 28; thence West 295 feet along the South line of said Section 28 to a point; thence Northeasterly on a straight line 2378.37 feet to a point on the East line of said Section 28, said point being 280 feet South of the East

Quarter corner thereof; thence South along said East line 2360 feet to the point of beginning.

The area described aggregates 7.99 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed $100.00

Tract No. A–124E

Indian Meridian T. 10 N., R. 19 W., Section 27 The Southeast Quarter of the Southwest Quarter

The area described aggregates 40 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed $4,100.00

SECOND

We, the undersigned commission, assess and fix the damage and the fair cash market value of the interest and estate in the following described real property, as appropriated on March 4, 1957 for the uses and purposes defined in the Amended Complaint and Declaration of Taking filed herein, to-wit:

Tract No. A–142E

Indian Meridian T. 10 N., R. 19 W., Section 27 North Half of the Southwest Quarter of the Northwest Quarter and that part of the Northwest Quarter of the Northwest Quarter described as follows: Beginning at the southwest corner thereof; thence north along the west line of said Northwest Quarter of the Northwest Quarter 1100.0 feet to a point; thence east and parallel to the north line of said Northwest Quarter of the Northwest Quarter 175.0 feet to a point; then North and parallel to said west line 220.0 feet to a point on the north line of said Northwest Quarter of the Northwest Quarter; thence east along said north line 280.0 feet to a point; thence

south and parallel to said west line 780.0 feet to a point; thence east and parallel to said north line 865.0 feet, more or less, to a point on the east line of said Northwest Quarter of the Northwest Quarter; thence south along said east line 540.0 feet to the southeast corner of said Northwest Quarter of the Northwest Quarter; thence west along the south line thereof to the point of beginning.

The area described aggregates 43.63 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ---------- $2,783.00

Tract No. A–142

Indian Meridian T. 10 N., R. 19 West, Section 27 A tract of land in the Northwest Quarter of the Northwest Quarter, more particularly described as: Beginning at the northeast corner of said Northwest Quarter of the Northwest Quarter; thence south along the east line of said Northwest Quarter of the Northwest Quarter 780.0 feet to a point; thence west and parallel to the north line of said Northwest Quarter of the Northwest Quarter 865.0 feet to a point; thence north and parallel to the West line of said Northwest Quarter of the Northwest Quarter 780.0 feet to a point on the north line of said Northwest Quarter of the Northwest Quarter; thence East along said north line 865.0 feet to the point of beginning,

Aggregating 15.49 acres, more or less, situate in Washita County, Oklahoma.

Damages Assessed ---------- $2,000.00

The commission finds that the defendant owners of Tract A–142 failed to make any adequate proof that any portion of said lands had any value except for agricultural purposes as of March 4, 1957 other than for uses caused solely by the acts of the condemnor

in constructing an air base installation; that the evidence presented by said owners concerning value of said land for a sand pit and the consequent sale of such sand for uses other than those brought about by the acts of the condemnor was so speculative and conjectural that this commission could not properly determine any increased valuation of said property because of the presence of sand or other building materials upon said property.

Wherefore, we, the undersigned commission, do find that the above amounts as set forth by each individual tract is just compensation to be awarded the owners of said real estate by reason of the appropriation by the United States of America, and we recommend in this, our report, that this court enter a judgment and decree in favor of the defendant land owners in the amounts hereinbefore set forth; that the United States of America be decreed to pay the costs of this proceeding, including fees and charges of this commission.

Respectfully submitted this 23rd day of October, 1959.

STANSELL E. WHITESIDE
FINIS C. GILLESPIE
JERRY TISDAL

APPENDIX II

In the United States District Court for the Western District of Oklahoma

ADDITIONAL REPORT OF COMMISSION—FILED OCTOBER 7, 1960

Comes now the undersigned, Stansell E. Whiteside, Finis Gillespie and Jerry *Tisdale,* commissioners appointed by this court in the above entitled cause and herewith supplement and add to the report of commissioners heretofore filed herein on November 9, 1959, as follows:

Said report of commissioners heretofore filed is hereby referred to and made a part hereof as if fully set forth herein.

FINDINGS OF FACT

This commission makes the following specific findings of fact.

1. Plaintiff has taken a clearance easement over and across each of the tracts hereinafter set forth as set forth in the Complaint herein, with heights stipulated to be as follows:

Tract A–104E: 13 feet on the south line, 50 feet in the center, and 70 feet on the north line;

Tract A–106E: 71 feet on the south line to 163 feet on the north line;

Tract A–107E: 69 feet on the south line to 164 feet on the north line;

Tract 118E: 32 feet on the north line to 85 feet on the south line;

Tract 119E: 81 feet on the north line to 145 feet on the south line;

Tract 122E: 105 feet on the north line to 145 feet on the south line;

Tract 123E; 125 feet on the north line to 145 feet on the south line;

Tract 124E: 109 feet on the north line to 150 feet on the south line;

which tracts are described as set forth in the report of commissioners herein, which taking was on March 8, 1956, which heights are approximate and which heights would vary according to the conture of the lands;

2. Plaintiff has taken a clearance easement over and across Tract A–142 as set forth in the amended complaint, with heights stipulated to be 17 feet on the north side to 42 feet on the south side, which tract is described in the report of commissioners herein, which taking was on March 4, 1957, which heights are approximate and which heights vary according to the conture of the lands;

3. Plaintiff has taken Tract A–142 in fee, as set forth in the amended complaint, which tract was taken on March 4, 1957, and which tract is described as set forth in the report of the commissioners herein.

4. Said tracts are owned in fee simple as hereinafter set forth:

Tract No. A–104E: Leo Merz and Lewis Merz;
Tract No. A–106E: W. E. Guthrie;
Tract No. A–107E: John Kerkoff;
Tract No. A–118E;
Tract No. A–142E; and
Tract No. A–142: Robert Davis;
Tract No. A–119E: E. E. Smith;
Tract No. A–122E: Bertha Rogers, Juanita Nagel and Wanda Riggins;
Tract No. A–123E: No evidence as to fee ownership;

Tract No. A–124E: Ella B. Hoover;

5. The only interest involved in this hearing as to Tract A–123 is an undivided one-half of the oil, gas and other minerals in and under said real estate;

6. There was an oil and gas lease on each of Tracts A–106E, A–107E, A–118E, A–122E, A–123E, A–142E, and A–142 at the time each of said tracts was taken.

7. Minard Henderson owned an undivided one-fourth of the oil, gas and other minerals in and under Tract A–104E at the time of taking but was not entitled to participate in leasing, bonus, or delay rentals; however, it was stipulated and agreed between plaintiff and the defendants, Leo Merz, Lewis Merz and Minard Henderson, that no distinction would be made between said non-participating mineral interest as owned by Minard Henderson because of such non-participation, and that said mineral interest would be treated as a full one-fourth interest in the minerals by this Commission.

8. That the highest and best use of the land involved and as set forth in the said report of commissioners filed herein is for general agricultural purposes.

CONCLUSIONS OF LAW

Our conclusions as to the law applicable are as follows:

First

The right of plaintiff to take the property involved is not disputed and the owner in each instance is entitled to just compensation for the taking of his or her property.

Second

The amount of just compensation for each land owner involved is the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value

of the estate of the defendants immediately after said taking, being the *demunition* of said fair cash market value caused solely and directly by the taking;

Third

Any use of said area included in the clearance easements taken, such as by airplanes or otherwise, is in no way involved in this litigation and is not an item of damage herein;

Fourth

The motion of the government to strike the evidence of L. A. Wilcox was overruled and the motion of the government to strike the evidence of Robert Davis as to the sales of materials from Tract A–142 was sustained;

JUDGMENT

The amount assessed as damages in the report of commissioners herein in each instance was the amount of just compensation for the land owners represented at said hearing and as set forth in paragraph three of the findings of fact herein. The amount assessed as damages in the report of commissioners included all of the mineral rights of each land owner, whether leased or unleased, except as to Tract A–104E and Tract A–123E. As to Tract A–104E the amount set forth in the said report of commissioners is the amount of just compensation to Leo Merz, Lewis Merz and Minard Henderson, and the said Iminard Henderson's mineral interest is and damages are hereby declared to have been based on a mineral value of $30.00 per acre and the said Iminard Henderson damaged therefor in the total amount of $1,010.25, which damages should be and are hereby deducted from the assessment heretofore made on said Tract A–104E in the amount of $16,718.00. As to Tract A–123E, the

amount set forth in report of commissioners is the amount of just compensation to answering defendants owning an undivided one-half interest in and to the oil, gas and other minerals in and under said tract.

Respectfully submitted this 26th day of September, 1960.

STANSELL E. WHITESIDE
FINIS C. GILLESPIE
JERRY TISDAL

Compensation Claim

Stansell Whiteside	1½ days at $50.00	$75.00
"	Telephone Expense	1.75
"	Mileage-Altus to Hobart	7.00
"	" Altus to Okla City	30.00
Stansell Whiteside (Total)		$113.75*
Finis C. Gillespie	½ day at $50.00	25.00*
Jerry Tisdal	½ day at $50.00	25.00
"	Mileage-Cordell to Hobart	6.00
Jerry Tisdal (Total)		$31.00*

APPENDIX III

SUMMARY OF PERTINENT STATISTICS

Landowners' Valuation Testimony

Tract No.	Number of acres	Easement elevation	Before value	After value	Damages
A-104E	134.70	13'-70'	$40,000.00	$20,000.00	$20,000.00
A-106E	83.70	71'-163'	25,000.00	12,500.00	12,500.00
A-107E	80.10	69'-164'	25,000.00	12,500.00	12,500.00
A-119E	138.73	81'-145'	30,000.00	15,000.00	15,000.00
A-122E	11.52	105'-145'	40,000.00	32,000.00	8,000.00
A-124E	40.00	109'-150'	40,000.00	20,000.00	20,000.00
A-118E	50.25	32'-85'	18,000.00	9,000.00	9,000.00
A-142E	43.63	17'-42'	(1)	(1)	(1)
Total	582.63		218,000.00	121,000.00	97,000.00

Landowners' Appraiser Willcox

Tract No.	Before value	After value	Damages
A-104E	$52,000.00	$14,789.12	$37,210.88
A-106E	60,200.00	40,899.99	19,300.01
A-107E	35,950.00	23,182.80	12,767.20
A-119E	45,500.00	19,352.33	26,147.67
A-122E	55,000.00	53,704.40	1,295.60
A-124E	13,000.00	6,224.80	6,775.20
A-118E	16,361.25	1,930.63	14,430.62
A-142E	(2)	(2)	(2)
Total	278,011.25	160,084.07	117,927.18

Government Appraiser Davis

Tract No.	Before value	After value	Damages
A-104E	$22,800.00	$14,550.00	$8,250.00
A-106E	22,400.00	21,700.00	700.00
A-107E	23,000.00	22,300.00	700.00
A-119E	28,400.00	23,800.00	4,600.00
A-122E	29,600.00	29,300.00	300.00
A-124E	31,200.00	29,600.00	1,600.00
A-118E	8,050.00	6,950.00	1,100.00
A-142E	5,410.00	4,310.00	1,100.00
Total	170,860.00	152,510.00	18,350.00

[1] Tracts A-142E and A-118E are part of the same 60-acre tract.
[2] See note 1, *supra*.

Government Appraiser Houck

Tract No.	Before value	After value	Damages
A-104E	$25,050.00	$17,450.00	[3] $7,650.00
A-106E	24,400.00	23,700.00	700.00
A-107E	24,000.00	23,300.00	700.00
A-119E	25,400.00	21,000.00	4,400.00
A-122E	28,300.00	28,100.00	200.00
A-124E	29,600.00	28,200.00	1,400.00
A-118E	7,250.00	6,150.00	1,100.00
A-142E	5,010.00	4,210.00	800.00
Total	169,010.00	152,110.00	16,950.00

Summary of Damages Testimony and Award

Tract No.	Landowner	Wilcox	Davis	Houck	Award
A-104E	$20,000.00	$37,210.88	$8,250.00	$7,650.00	$16,718.00
A-106E	12,500.00	19,300.01	700.00	700.00	5,261.00
A-107E	12,500.00	12,767.20	700.00	700.00	5,333.00
A-119E	15,000.00	26,147.67	4,600.00	4,400.00	8,500.00
A-122E	8,000.00	1,295.60	300.00	200.00	2,387.00
A-124E	20,000.00	6,775.20	1,600.00	1,400.00	4,100.00
A-118E	9,000.00	14,430.62	1,100.00	1,100.00	4,900.00
A-142E	[4]	[4]	1,100.00	800.00	2,783.00
Total	97,000.00	117,927.18	18,350.00	16,950.00	49,982.00

[3] $50 was allowed for removal of trees.
[4] See note 1, supra.

U.S. GOVERNMENT PRINTING OFFICE:1983

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 65

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

LOUIS T. MERZ, ET AL.,
Respondents.

BRIEF FOR THE RESPONDENTS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DENVER W. MEACHAM,
Clinton, Oklahoma;

WILLIAM J. HOLLOWAY, JR.,
PAUL R. McDANIEL,
Oklahoma City, Oklahoma,

Counsel for Respondents.

October, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-8780

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APPENDIX

Federal Rules of Civil Procedure Involved i

In the
Supreme Court of the United States
OCTOBER TERM, 1963

No. 65

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

LOUIS T. MERZ, ET AL.,
Respondents.

BRIEF FOR THE RESPONDENTS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The District Court prepared no opinion. The opinion of the Court of Appeals (R. 471-478) is reported at 306 F.2d 39.

JURISDICTION

The jurisdictional requisites are adequately stated in the brief of petitioner under 28 U.S.C. 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rules 53(e)(2) and 71A(h) are set out in the Appendix hereto.

QUESTIONS PRESENTED

1. Whether objections as to the absence of particular findings in a commission's report on just compensation may be raised in this Court, when such objections were not included in the written objections to the report in the District Court required by Rule 53(e)(2) of the Federal Rules of Civil Procedure, and no issue as to the amounts of the awards was presented to the Court of Appeals or in the petition for certiorari?

2. If such objections may now be urged in this Court, whether, on this record involving lands viewed by the Commission, there was sufficient detail in the findings and reports which stated the farm tracts involved, the clearance easements taken, the highest and best use of the land (specifically rejecting claimed special uses), and the proper measure of just compensation (the difference in fair cash market value immediately before and after the taking), specifically excluding any consideration of use of space within the clearance easements by aircraft or otherwise?

STATEMENT

This is a condemnation action to take clearance easements over several farms and one tract in fee in Washita County, Oklahoma. The clearance easements were taken to provide additional facilities for Clinton-Sherman Air Force Base and for other military purposes of the Air Force (R. 2). The complaint was filed in March, 1956 (R. 2).

The clearance easements taken varied from 13 to 164 feet in elevation (R. 46-47). They granted the Government the perpetual right to top, cut to ground level, remove and prohibit trees, bushes, shrubs, or any other growth or

undergrowth from extending above described planes. They granted the continuing perpetual right to remove, raze, destroy and prohibit any construction of buildings, other structures and embankments within the easements and granted the right of ingress and egress to exercise such rights (R. 3). Due to stipulation as to some awards and judgments being unappealed as to others, this case now involves eight clearance easements.

By reason of the character, quantity and location of the property condemned, and for other reasons, the District Court ordered the issue of just compensation to be heard by a Commission (R. 36-37). The Government objected to this method of trial in the District Court, but the objection was abandoned prior to appeal to the Tenth Circuit. The District Court's judgment adopted the findings and reports of the Commission (R. 54). On the appeal from that judgment, the Government raised only two questions—the sufficiency of detail in the reports and the admissibility of the testimony of one witness, Mr. Willcox. The single issue presented by the Government now is the adequacy of details in the reports. Neither on the appeal below nor in the petition for certiorari was any question raised as to the sufficiency of the evidence to support the awards.

The Commission filed both an original "Report of Commission" and an "Additional Report of Commission," giving the Government two opportunities to file written objections pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure (R. 37-44, 45-49). The findings and reports described separately the tracts involved and stated the clearance easements taken as to each tract, varying from 13 to 164 feet in elevation (R. 37-44). They found the owner-

ship of the tracts and the nature of the interests owned by the parties, and further that the highest and best use of the land was for general argicultural purposes (R. 47).

The reports stated the measure of compensation awarded each land owner—". . . the difference between the fair cash market value of the estate of the defendants at the time of the taking and the fair cash market value of the estate of the defendants immediately after said taking being the demunition (*sic*) of said fair cash market value caused solely and directly by the taking . . ." (R. 48). The reports rejected any consideration of use of the area included in the clearance easements, such as by airplanes or otherwise (R. 48). It was found that the proof was speculative and inadequate to show any value of Tract A-142 as a sand pit (R. 43-44). The reports stated that the motion to strike the evidence of Mr. Davis as to sales of sand from Tract A-142 was granted, and that the motion to strike all the testimony of Mr. Willcox was denied (R. 48). And it was reported that the Commission personally viewed the lands in question (R. 38).

The Government made no request for specific findings and the order appointing the Commission required no speical findings of fact and conclusions of law (R. 36-37). After trial and filing of the findings and reports by the Commission, the Government served written objections. Among other objections to the original report, the general objection was made that no findings of fact or conclusions of law were set forth as required by Rule 53 (R. 44). Upon the filing of the additional report, which incorporated the original report in full (R. 46), the Government made its written

objections to *both* the original report and the additional report (R. 49-52). Eight objections were stated, Objections 2 through 6 relating to the form of the reports (R. 50).

These written objections served pursuant to Rule 53(e)(2) made the general objection that "The Reports wholly fail to make specific findings as to the facts . . ." (Objection 2, R. 50). Further objections complained only in general terms that the reports failed to show the exclusion of incompetent evidence and how controverted testimony was resolved; that the reports amounted only to a general verdict, precluding review; and that ownership of one tract was not found (R. 50).[1] Due to their importance in connection with the requirement of written objections under Rule 53(e)(2), these objections by the Government in the District Court are discussed and reproduced in full hereafter (pp. 9-10, *infra*). The objections served did not include objections now made to the findings, calling for at least five specified additional findings discussed in the Government's brief (Brief for the United States, pp. 10-13).

The District Court overruled the written objections and adopted the reports by its judgment (R. 54-69). The general objection as to the form of the reports was also rejected by the Court of Appeals. It sustained the reports as showing the proper method of determining just compensation, and stated that the awards "were well within the range of this conflicting testimony" 306 F.2d at 42. The

[1] This question was resolved by a procedure suggested by the Court (R. 53), and the finding was made in the judgment (R. 64-65, 69-70). No complaint on this point is now made by the Government. The objection does demonstrate how such contentions as to form may properly be taken care of in the trial procedure, upon timely specified objections.

opinion below observed that the evidence presented was properly directed solely to the diminution in value of the lands after the taking, and that there were not numerous elements to consider as to just compensation. The Tenth Circuit concluded:

> "We are satisfied that, considering the record as a whole, including all the evidence, our power to review the awards can be properly exercised, and that more specific findings would not be helpful. The situation might be different if there were numerous elements to be considered in arriving at just compensation, as there were in the cases from the Fourth and Fifth Circuits which the United States relies upon. The issues in this case are not complicated, however, and the findings are entirely adequate to permit us to review them and conclude that they are not clearly erroneous." 306 F.2d at 42-43.

ARGUMENT

Introductory

Rule 53(e)(2) of the Federal Rules of Civil Procedure requires that written objections to reports be served. In this case, the Government had two opportunities to specify any additional findings that it wished. The written objections to the original report, and the subsequent written objections directed to both the original and additional report, contained no specification of the five special findings now mainly argued by the Government. The only timely objections which might be relied upon by the Government spoke in mere general terms of the insufficiency of the findings of fact and conclusions of law. The sound requirement for such objections as to form to be timely made precludes

insistence upon such details at this juncture. Moreover, neither in the Court of Appeals nor in the petition for certiorari were the awards to these land owners questioned on the ground that the evidence was insufficient to support them. Under these circumstances, the belated specification of details should not be heard as grounds for prolonging the litigation.

The original "Report of Commission" and the "Additional Report of Commission" stated sufficiently the findings and conclusions supporting the awards. They demonstrate that the awards—well within the range of conflicting testimony—were soundly based on the fair cash market value of the property immediately before and after the taking. Improper elements of compensation were expressly excluded from consideration. In practical terms, the reports are sufficient on this record for fair judicial review, as both the District Court and Court of Appeals found. The objections as to form do not justify reversal and prolongation of the controversies.

I.

The Government's objections to the reports may not be urged now, not having been included within the written objections required by Rule 53(e)(2), and the amounts of the awards being unchallenged.

Rule 71A(h) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. *Its action and report shall be determined by a majority and its findings and report shall*

have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court." (Emphasis added.)

Rule 53(e)(2) of the same rules, made applicable by Rule 71A(h) to such commission procedure, provides:

"(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the masters' findings of fact unless clearly erroneous. *Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties.* Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (Emphasis added.)

The requirement of written objections to the report, if any be asserted, is plainly mandatory. To prevent piecemeal and protracted proceedings before masters and commissions, such objections are required to be timely served. They are required when they may be useful to correct errors in form, and may not be urged as untimely grounds for remand for additional findings—or for a new trial after seven years of litigation as requested by the Government in this case.[2]

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[2] Brief for The United States, p. 30. The inequity of this position is underscored by the fact that the Government did not question the sufficiency of the evidence to sustain the awards in the Court of Appeals or in the petition for certiorari. Moreover, these cases of individual land owners have been in court for over seven years on relatively small controversies as to deficiencies in the deposits for the takings (R. 66-67).

The written objections to the reports made no request for the findings now specified by the Government. After filing of the original "Report of Commission," written objections were served by the Government (R. 44-45). They are moot because of filing of the "Additional Report of Commission" and the superseding written objections by the Government to *both* reports (R. 49-52). Nevertheless, it should be noted that these written objections to the original report required none of the findings now detailed by the Government (R. 44-45). On this score, the Government can point only to the general terms of Objection 2 ". . . that no findings of fact or conclusions of law are set forth therein as required by Rule 53, F.R.C.P." (R. 44). None of the objections raised the five "factual questions" now stressed by the Government (Brief for The United States, pp. 10-11).

With the filing of the subsequent "Additional Report of Commission" (R. 45-49), the Government had its second opportunity for objections. It served written objections under Rule 53(e)(2), addressed to *both* the original and additional report (R. 49-52). All of the objections having relevance to the Government contentions on insufficiency of detail in the reports are reproduced in the note below.[3]

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[3] The relevant portions of the written objections directed to both the original and additional reports, are as follows:

"Objections to Report of Commission and Additional Report of Commission—Filed October 14, 1960.

"Comes now the plaintiff the United States of America and objects to the Report of the Commission dated October 23, 1959, filed herein on November 9, 1959, and to the Additional Report of Commission dated September 26, 1960, and filed October 7,

The only objections the Government might rely upon as including the five findings now specified would be the Mother-Hubbards, Objections 2 and 5. Objection 2 complained only in general terms of failure to make specific findings as to the facts and failure to show how applicable principles of law were applied. Objection 5 alleged that the reports amounted only to a general verdict. Nowhere did the objections appear which the Government argues now.

Now the Government states its objections to the reports in terms of five "illustrative factual questions" that are posed. It is urged that the reports should have found specially the market value of the land before the taking;

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[3] (Continued)

1960, in Tracts Nos. A-104E, A-106E, A-107E, A-118E, A-119E, A-122E, A-123E, A-124E, and A-142E for the following reasons:

* * * * * *

"2. The Reports wholly fail to make specific findings as to the facts on which the Commission based its valuation, and fail to show hay (sic) they applied applicable principles of law to the facts in reaching their ultimate conclusions.

"3. The Reports wholly fail to show that all incompetent and inadmissible testimony was disregarded.

"4. The Reports wholly fail to show how controverted testimony was resolved, if it were, in arriving at the valuations, and are therefore deficient and inadequate.

"5. The Reports taken as a whole amount to no more than a general verdict of a jury, since no specific findings of any controverted issues were made, the only specific findings being as to those matters which were stipulated to by the parties to this action. Therefore the Reports are wholly inadequate to furnish an adequate basis for review by the Trial Judge or an Appellate Court.

"6. The Reports are inadequate in that they fail to make a finding as to the ownership of the portion of Tract No. A-123E herein being litigated." (R. 49-50).

the proportional depreciation in value attributable to the easements; the value of the mineral estates; the injury to the mineral estates caused by the easements; and the practical effect of the easements on agricultural use of the land (Brief for The United States, pp. 10-13). The Government argues that "at least" these questions should have been resolved.

The Court of Appeals in the instant case properly held that on this record sufficient determinations were made, as did the Ninth Circuit under similar circumstances in *United States* v. *Lewis*, 308 F.2d 453 (9th Cir. 1962). But in any event, the Government should not be heard now on new objections—objections that should have been served within ten days after the reports and not three years later on a third court review. As the Ninth Circuit properly held, such review of the form of reports should be confined ". . . to ascertain what specific matters are asserted, by objections of the United States, not to have been dealt with adequately." *Id.* at 456.

Rule 53(e)(2) has made clear the requirement of timely written objections to such reports. The equity requirement and its function are stated plainly in *Sheffield & Birmingham Coal, Iron & R. Co.* v. *Gordon*, 151 U.S. 285, 290-291 (1894):

> "Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions.
>
> * * * * * * *

> "So in *Greene* v. *Bishop*, 1 Cliff. 186, 191, *Mr. Justice Clifford* held that 'general allegations of error, without pointing to any particulars, are clearly insufficient, for the reason that, if allowable, the losing party might always compel the court to hear the cause anew, and should that practice prevail, references such as are made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the labor of the trial or ever accomplishing anything of value to either party.' See also *Stanton* v. *Alabama & C.R. Co.* 2 Woods, 506, 518."

Where such particular objections to a report are not timely made in the trial court, they will not be considered as grounds for reversal of the judgment. *United States* v. *Northern Pacific Ry.*, 311 U.S. 317, 372 (1940); *Sheffield & Birmingham Coal, Iron & Ry. Co.* v. *Gordon*, *supra*; *Coghlan* v. *South Carolina R. R.*, 142 U.S. 101, 114-115 (1891); *Simpson* v. *Baker*, 2 Black (67 U.S.) 581 (1862); *Savage* v. *Monarch Royalty Corp.*, 64 F.2d 650 (10th Cir. 1933); *Cf. Kennedy* v. *United States*, 115 F.2d 624, 625 (9th Cir. 1940). Allegations of error in such reports are considered only when pointed out by specific objections, and not by mere "general objections," as *Simpson* v. *Baker*, *supra*, and *Savage* v. *Monarch Royalty Corp.*, *supra*, forcefully demonstrate. Moreover, the requirement of timely objections should apply with special force where the complaints deal with the form of the reports only.

In *United States* v. *Lewis*, 308 F.2d 453 (9th Cir. 1962), such attempted reservation of the Government's contentions by a mere general objection was rejected. The Court care-

fully limited its review as to the sufficiency of details in the reports to the specific objections served by the Government. Where the written objections disclosed specific deficiencies, such as the absence of a finding on the highest and best use, the opinion reversed the *Gill* and *Lewis* cases. 308 F.2d at 458-459. The *Bennington* and *Morrison* cases were remanded for reconsideration of the transcript on the predicate of "specific objections to specific findings" 308 F.2d at 461. The Court refused to consider abstract complaints about the findings or to remand for conformity to some unarticulated standard of detail in reports, stating:

> *"This course we reject. If there be inadequacies in a particular report, they must be specified by objection to the report.* If any case is to be remanded for correction of error in this area, it must be with instructions that by report or finding resolution of some specific dispute be made or some specific inadequacy be remedied. Otherwise, as we view the matter, there could be no end to these litigations.
>
> *"We shall then in each case examine the record and briefs to ascertain what specific matters are asserted, by objections of the United States, not to have been dealt with adequately."* 308 F.2d at 456. (Emphasis added.)

Rule 53(e)(2) and sound equity practice do not permit such belated objections to the reports. Since they were not asserted by timely written objections, this Court should not now entertain the Government's objections as to form. As for the substance of the controversy, all contentions as to sufficiency of the evidence to support the awards have long since been discarded. Under these circumstances, the judgments in seven years of litigation should not be erased.

II.

The reports adequately stated the basis of the awards and are sufficient for proper judicial review.

The Court of Appeals recognized that the findings must be "sufficiently comprehensive and pertinent to the issues" to provide the basis for the awards. 306 F.2d at 42. After review of this record, both the District Court and the Court of Appeals were satisfied that on these particular facts, the findings were sufficiently specific to serve as the basis for the awards, with proper judicial review. Their conclusion was sound.

Although it was not aided by Government requests for specific findings and conclusions, or by written objections disclosing particular findings desired by the Government, the Commission made the essential determinations. It described the tracts involved, which the Commission viewed (R. 38-43); the clearance easements taken (R. 46); the interests owned by the parties; and it found the highest and best use of the land to be for general agricultural purposes (R. 47). Improper elements were specifically excluded from the Commission's consideration, such as use of the area within the easements by aircraft or otherwise (R. 48). The reports determined that there could be no value attached to certain land because of the presence of sand or other building materials on the property (R. 43-44), and all the proof relating thereto was stricken by the reports (R. 48). The damages found were confined to diminution of fair cash market value immediately before and after the taking (R. 48). The basis of the awards was made clear.

The Court of Appeals properly judged these findings to be adequate. It concluded:

"'The primary and basic test as to the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision.' Shapiro v. Rubens, 7 Cir., 166 F. 2d 659, 665. See United States v. Tampa Bay Garden Apartments, Inc., 5 Cir., 294 F. 2d 598; United States v. Pendergrast, 4 Cir., 241 F.2d 687; 5 Moore's Fed. Practice Par. 52.06 [1], at 2656 (2d Ed. 1951). The extent of exactness which is required in findings depends upon the nature of the matter involved. Kelley v. Everglades Drainage Dist., 319 U.S. 415, 63 S. Ct. 1141, 87 L.Ed. 1485. The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made." 306 F.2d at 42.

The Government maintains that "at least" some five additional subsidiary facts should be found and many questions of law resolved (Brief for The United States, pp. 10-13). We submit that the Commission's determinations were made clear. More words might argue better for its judgment on the awards, but their basis is adequately stated. We reach the point whether, as the Government contends, masters and commissions are to be policed under a requirement to "show both what the evidence was and how the commission used it in reaching its conclusions" (Brief for The United States, p. 22). This position is both unsound and unsupported. The direct answer to the Government's contention was stated by JUDGE LEARNED HAND:

"*. . . Findings should not be discursive; they should not state the evidence or any of the reasoning upon the evidence;* they should be categorical and confined to those propositions of fact which fit upon the relevant

propositions of law . . ." *Petterson Lighterage & Towing Corporation* v. *New York Central R. Co.*, 126 F.2d 992, 996 (2d Cir. 1942). (Emphasis added.)

Masters and commissions should not be called upon for a discourse on what the evidence was and how it was used. Such a procedure would be a needless burden, stultifying the proper function of these court officers. This notion has been rejected for court findings, as well as those of masters and commissions. Findings are not obliged to include "a detailed itemization of the proof relied upon in order to reach that result." *United States* v. *Lewis*, 308 F.2d 453, 460 (9th Cir. 1962); *Loew's* v. *Lieberman*, 78 F. Supp. 201, 216 (D. Mass. 1948). They need not contain "detailed evidentiary findings . . ." *Carr* v. *Yokohama Specie Bank, Limited*, 200 F.2d 251, 255 (9th Cir. 1952), nor must they extend to "specific findings on every subsidiary evidentiary issue . . ." *Elam* v. *United States*, 250 F.2d 582, 583 (6th Cir. 1958), as the Government seems to insist. Findings need not be made "on all the facts presented," *Klimkiewicz* v. *Westminster Deposit & Trust Co.*, 122 F.2d 957, 958 (D.C. Cir. 1941), *cert. den.*, 315 U.S. 805 (1942), and they are not inadequate because they do not discuss every contention of the parties. *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944).

As the opinions indicate, neither court findings nor those of masters and commissions have been held to the requirements for minutiae which the Government suggests. Especially if applied to masters and commissions, such demands for the detailing of evidence and its analysis would impede procedures designed for the weighing of voluminous proof. The use of commissions under Rule 71A(h), permit-

ting the hearing of a volume of claims and viewing of numerous properties, would be unreasonably burdened by insistence upon such discursive findings. Instead, commission findings should be required only in reasonable detail, showing the basis of awards made. As the Tenth Circuit properly held, this is now the rule. And it is soundly fashioned for the use, in necessary cases, of commissioners with varied skills and the viewing of properties, to which great weight is attached. See *e.g.*, *United States* v. *Wise*, 131 F.2d 851, 853 (4th Cir. 1942); *United States v. Certain Lands located in Orange County*, 57 F. Supp. 96, 98 (S.D. N.Y. 1934); *United States* v. *80.46 Acres in Erie County*, 59 F. Supp. 876, 877 (W.D. N.Y. 1944), *aff'd*, 148 F.2d 714 (2d Cir. 1945).

We will respond briefly to the details of the Government contentions on the need for additional findings. The arguments focus primarily on the five additional "illustrative factual questions" now specified,[4] commencing with stress upon market value before the taking. Of course, the proof taken properly included considerable testimony on values before and after the taking from several witnesses, and the Commission viewed the lands (R. 38). From the expert testimony as summarized by the Government brief, it is apparent that with all the elements considered, there was a range on values before and after the taking from $16,950.00 to $117,927.00 as the amount of damages, and

[4] The questions suggested relate to (1) the market value of the land before the taking; (2) the proportional depreciation in value attributable to the easements; (3) the value of the mineral estates; (4) the injury to the mineral estates; and (5) the practical effect of the easements on the agricultural use of the land (Brief for The United States, pp. 10-13).

the total of all the awards amounted only to $49,982 (Brief for The United States, Appendix III, pp. 45-46).[5] Obviously, the values before and after the taking were considered and not ignored in making the awards. There was substantial evidence on mineral values and the damage to them (R. 120, 127-132, 164, 239-241)[6] as well as on damage to agricultural use of the land (R. 130, 137, 184-186).

Since the awards were soundly based on the evidence and well within its limits, checking the work papers of the Commission would not seem necessary. Similarly, a double check on the Commission by asking for calculations on the basis of the proportional depreciation in value to each tract—which is irrelevant—would impose an unjustified burden. The courts have properly rejected such belated efforts by a party to have additional facts found to strengthen its position on appeal. *Cf. Kennedy* v. *United States*, 115 F.2d 624, 625 (9th Cir. 1940). In any event, with the sufficiency of the evidence to support the awards apparent and unquestioned, the request for such laborious calculations seems out of place.

The decisions relied upon by the United States do not support the contention that the Commission's report must

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[5] The amount of $117,927.00 was the proof of damages from Mr. Willcox. The criticism of his testimony is unfounded, and the record shows he clearly stated his opinions on the basis of fair cash market values immediately before and after the taking for each tract (R. 125, 128, 129, 130, 132, 186-187), considering the height of the specific easements taken and valuing the minerals separately.

[6] As the Court of Appeals pointed out, note 2, 306 F.2d at 41, Mr. Willcox valued the minerals separately and found total damage to them suffered when the clearance easements were lower than the height of an average drilling rig (R. 127-133).

detail such subsidiary evidentiary findings. Cases involving review of decisions by administrative tribunals have little, if any, relevance to a determination of the specificity required of commissioner's reports. Section 8(b) of Administrative Procedure Act[7] requires detailed findings by administrative agencies. Furthermore, the cases cited by the Government deal only with the correctness of the rule of law applied by a particular administrative agency, *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953); or with the question of whether the court could ascertain whether or not the agency had applied the correct principles of law in making its determination. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942); *Florida* v. *United States*, 282 U.S. 194 (1931); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499 (1935). In the present case it is clear that the commissioners applied the correct rule of law, i.e., the difference in the fair market value before and after the taking.

Cases holding that district courts must comply with Rule 52(a) in making their determinations are undoubtedly correct, but have little bearing on whether the reports herein involved are adequate. See *Commissioner* v. *Duberstein*, 363 U.S. 278, 284-285 (1960), where the Court refused to lay down a uniform rule as sought by the Govern-

[7] Section 8(b) of the Administrative Procedure Act provides that agency decisions shall include a "statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented in the record." 5 U.S.C. § 1007(b).

ment; *Hatalhey* v. *United States*, 351 U.S. 173 (1956); *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940); *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.*, 289 U.S. 67 (1933), where the lower court made no findings at all. Rather, as the Government realizes, in cases involving commissioners' reports, the courts of appeals have recognized that the facts of each case must determine the requisite specificity of findings and have refused to announce a uniform rule such as requested by the Government.[8] Indeed the Government's suggestion that reviewing courts should look only to the reports (Brief for The United States, p. 22) in effect precludes the type of judicial review that every court of appeals has announced it will undertake, namely to review, as required by Rule 53(e)(2), the findings and the evidence to see if the findings are clearly erroneous. The parties are entitled to such a review by the appellate court and not one restricted to a mere summary of the evidence.

We come to the two opinions being reviewed by this Court, No. 79, *2872.88 Acres of Land, etc., et al.* v. *United States*, 310 F.2d 775, from the Fifth Circuit, and the instant case from the Tenth Circuit. We are not familiar with de-

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[8] Thus, see the different *results* recorded in the following cases under varying facts. *United States* v. *Cunningham*, 246 F.2d 330 (4th Cir. 1957); *United States* v. *Carroll*, 304 F.2d 300 (4th Cir. 1962); *United States* v. *Pendergrast*, 241 F.2d 687 (4th Cir. 1957); *United States* v. *2,477.79 Acres of Land in Bell County*, 259 F.2d 23 (5th Cir. 1958); *United States* v. *Bubler*, 254 F.2d 876 (5th Cir. 1958); *United States* v. *44.00 Acres in the Town of Greece*, 234 F.2d 410 (2d Cir. 1956), *cert. denied*, 352 U.S. 916 (1956); *United States* v. *Certain Parcels of Land in Philadelphia*, 215 F.2d 140 (3d Cir. 1954); *United States* v. *Lewis*, 308 F.2d 453 (9th Cir. 1962); *United States* v. *Waymire*, 202 F.2d 550 (10th Cir. 1953).

tails of the record in the former case, but the opinion does require the reports to state which evidence was credited and which was discredited and to identify that relied upon. In this, it seems contrary to the sound reasoning of JUDGE LEARNED HAND in *Petterson Lighterage & Towing Corp.* v. *New York Central R.R.*, 126 F.2d 992, 996 (2d Cir. 1942), and the cases discussed in connection with it, *supra*, pp. 15-16. See also *Ramos* v. *Matson Navigation Co.*, 316 F.2d 128, 130, 132 (9th Cir. 1963). It goes beyond the practical requirement, depending on the nature of the case, that findings be "sufficient to indicate the factual basis for the ultimate conclusion." *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 421 (1943).

The opinion of the Tenth Circuit in the instant case is in accord with decisions of this Court, and with the general requirement soundly applied as to such findings. On this record it was correct in concluding:

> ". . . The evidence presented to the commission in this case related entirely to the diminution in value of the lands after the easements were taken, and a general finding as to this amount was made.
>
> "We are satisfied that, considering the record as a whole, including all the evidence, our power to review the awards can be properly exercised, and that more specific findings would not be helpful . . ." 306 F.2d at 42.

CONCLUSION

We submit that the Government's objections are untimely and unsound. The work of this Commission was done properly—in substance and in form. It should not be undone now.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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October, 1963.

APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 53(e)(2) provides:

> "(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Rule 71A(h) provides as follows:

> "(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed

[APPENDIX]

by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."